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Third report on crimes against humanity

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Introduction

A. Work to date on this topic

1. At its sixty-sixth session in 2014, the International Law Commission decided to include the topic "Crimes against humanity" in its current programme of work and appointed a Special Rapporteur.[1] At its sixty-seventh session in 2015, the Commission held a general debate concerning the Special Rapporteur's first report and provisionally adopted four draft articles and commentaries thereto.[2]

2. At its sixty-eighth session in 2016, the Commission held a general debate on the Special Rapporteur's second report and provisionally adopted six additional draft articles and commentaries thereto.[3]

B. Debate in 2016 in the Sixth Committee

3. During the debate in the Sixth Committee in 2016, thirty-nine States (including one on behalf of the Nordic States) commented on the topic of "Crimes against humanity",[4] with views that generally favoured the Commission's work to date, stressing the overall importance of the topic[5] and welcoming the draft articles adopted during the sixty-eighth session.[6] Numerous States again expressed appreciation of the steps taken to ensure that the Commission's work does not conflict with existing instruments, in particular the 1998 Rome Statute of the International Criminal Court.[7] Along these lines, several States expressed support for the Commission's use in certain instances of language similar to that of the

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[1] See the Report of the International Law Commission on the work of its sixty-sixth session, *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 10* (A/69/10), paragraph 266.

[2] See the Report of the International Law Commission on the work of its sixty-seventh session, *Official Records of the General Assembly, Seventieth session, Supplement No. 10* (A/70/10), paragraph 113.

[3] See the Report of the International Law Commission on the work of its sixty-eighth session, *Official Records of the General Assembly, Seventy-first session, Supplement No. 10* (A/71/10), paragraphs 79–83.

[4] Presentations to the Sixth Committee on this topic were made by: Argentina, Australia, Austria, Belarus, Brazil, Chile, China, Croatia, Cuba, Czechia, El Salvador, Egypt, France, Germany, Greece, Hungary, Iceland (on behalf of the Nordic countries), India, Indonesia, Ireland, Israel, Japan, Malaysia, Mexico, the Netherlands, Peru, Poland, Portugal, Romania, the Russian Federation, Singapore, Slovakia, Slovenia, Spain, Switzerland, Sudan, the United Kingdom, the United States of America and Viet Nam.

[5] See, for example, Croatia, *Official Records of the General Assembly, Seventy-first session, Sixth Committee, 25th meeting* (A/C.6/71/SR.25), paragraph 47; and El Salvador, *ibid.*, paragraph 50.

[6] See, for example, Czechia, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 69 ; and Slovakia, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 141.

[7] See, for example, Argentina, *ibid., 29th meeting* (A/C.6/71/SR.29), paragraph 85; Australia, *ibid., 25th meeting* (A/C.6.71.SR.25), paragraph 90; Germany, *ibid., 26th Meeting* (A/C.6/71/SR.26), paragraph 35; Iceland, on behalf of the Nordic countries, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 58; Mexico, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 14; Peru, *ibid., 30th meeting* (A/C.6/71/SR.30), paragraph 5; Portugal, *ibid., 25th meeting* (A/C.6/71/SR.25), paragraph 92; Switzerland, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 67; and the United Kingdom, *ibid.*, paragraph 73.

Rome Statute of the International Criminal Court,[8] such as in draft article 5, paragraphs 2 and 3.

4. Several States welcomed the inclusion of an obligation to adopt national laws on crimes against humanity,[9] noting the importance of the harmonization of national laws[10] so as to allow for robust inter-State cooperation.[11] States also expressed their support for the approach taken by the Commission on command responsibility,[12] the inapplicability of a superior orders defence[13] and the inapplicability of statutes of limitations.[14] At the same time, some States felt that draft article 7 on the obligation to investigate was unclear[15] and that additional analysis might be given to the concept of "universal jurisdiction"[16] and liability for legal persons.[17] Additionally, some States pressed for the consideration of additional issues, such as extradition,[18] mutual legal assistance,[19] reparations for victims[20] and amnesty,[21] while other States expressed a view that certain issues should not be included, such as civil jurisdiction[22] or monitoring mechanisms.[23]

5. Several States indicated that they support the possibility of the present draft articles becoming a new convention,[24] though one State proposed that the project focus on creating guidelines instead of a binding instrument.[25] One State also expressed concern that the current topic risked duplicating efforts being undertaken

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[8] See, for example, Argentina, *ibid., 29th meeting* (A/C.6/71/SR.29), paragraph 85; Ireland, *ibid., 27th meeting* (A/C.6/71/SR.27), paragraph 14; Romania, *ibid., 25th meeting* (A/C.6/71/SR.25), paragraph 74; and Slovenia, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 106.

[9] See, for example, Australia, *ibid., 25th meeting* (A/C.6/71/SR.25), paragraph 90; Brazil, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 89; Hungary, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 78; and Iceland, on behalf of the Nordic countries, *ibid.*, paragraph 58.

[10] See, for example, Brazil, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 89.

[11] See, for example, Australia, *ibid., 25th meeting* (A/C.6/71/SR.25), paragraph 90; and Iceland, on behalf of the Nordic countries, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 58.

[12] See, for example, Chile, *ibid., 25th meeting* (A/C.6/71/SR.25), paragraph 98; Croatia, *ibid.*, paragraph 48; and Switzerland, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 66.

[13] See, for example, Chile, *ibid., 25th meeting* (A/C.6/71/SR.25), paragraph 98; and Switzerland, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 66.

[14] See, for example, Chile, *ibid., 25th meeting* (A/C.6/71/SR.25), paragraph 99; Romania, *ibid.*, paragraph 74 ; and Spain, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 4.

[15] See, for example, Spain, *ibid.*, paragraph 7.

[16] See, for example, Hungary, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 82.

[17] See, for example, Czechia, *ibid.*, paragraph 69; Hungary, *ibid.*, paragraph 81; and Mexico, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 18.

[18] See, for example, Spain, *ibid.*, paragraph 3; and Switzerland, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 67.

[19] See, for example, Mexico, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 19; the Netherlands, *ibid.*, paragraph 40; and Portugal, *ibid., 25th meeting* (A/C.6/71/SR.25), paragraph 93.

[20] See, for example, Poland, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 54.

[21] See, for example, Spain, *ibid.*, paragraph 3.

[22] See, for example, the United Kingdom, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 73.

[23] See, for example, Israel, *ibid., 25th meeting* (A/C.6/71/SR.25), paragraph 43; and Mexico, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 15.

[24] See, for example, Croatia, *ibid., 25th Meeting* (A/C.6/71/SR.25), paragraph 47; Egypt, *ibid., 23rd meeting*, (A/C.6/71/SR.23), paragraph 42; Hungary, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 78; and Germany, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 34.

[25] See Malaysia, *ibid.*, paragraph 66.

in existing regimes.[26] Some States noted the existence of a separate initiative by several States to develop a convention focused on mutual legal assistance and extradition for all serious international crimes, and encouraged the Commission to engage in a dialogue with those involved in this separate initiative.[27] One State urged the Commission to complete its work on this topic "as swiftly as possible".[28]

C. Purpose and structure of the present report

6. The purpose of the present report is to address a series of additional issues relating to this topic, to propose what might be an appropriate preamble in the event that the present draft articles are transformed into a convention, and to consider the possibility of final clauses to such a convention. The issues addressed herein are: the rights, obligations and procedures applicable to the extradition of an alleged offender; *non-refoulement* where there are substantial grounds for believing that a person would be in danger of being subjected to a crime against humanity; the rights, obligations and procedures applicable to mutual legal assistance; the participation and protection of victims, witnesses and others in relation to proceedings within the scope of the present draft articles; reparation for victims; the relationship to competent international criminal courts; obligations upon federal States; monitoring mechanisms and dispute settlement; a draft preamble; and further issues for which proposals are not being advanced.

7. Chapter I of this report addresses rights, obligations and procedures applicable to the extradition of an alleged offender, based upon the different types of extradition provisions included in various treaties addressing crimes. Less detailed extradition provisions include a general obligation to consider the offences in the treaty to be extraditable offences in a State's existing extradition treaties and any future extradition treaty the State completes. More detailed extradition provisions, however, allow for the treaty itself to be used as a basis for extradition, and address a wide range of issues that can arise in the context of extradition, including: the inapplicability of the political offence exception; satisfaction of the requirements of national law in the extradition process; extradition of a State's own nationals; the prohibition on extradition when an individual will face persecution after extradition; and requirements of consultation and cooperation. Chapter I concludes by proposing a draft article addressing these points in the context of crimes against humanity.

8. Chapter II addresses the principle of *non-refoulement*. This principle, or the prohibition on returning an individual to a territory when there are substantial grounds for believing that he or she will be in danger of a specified harm, is found in a wide range of legal instruments, including conventions relating to refugees and asylum, human rights and criminal law. In such treaties, *non-refoulement* is triggered when there are substantial grounds for believing that the person will be in danger of persecution or other specified harm upon return, with the harm in question varying depending on the subject matter of the treaty. Though there are limited

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[26] See India, *ibid., 27th meeting* (A/C.6/71/SR.27), paragraph 40.

[27] See, for example, Argentina, *ibid., 29th meeting* (A/C.6/71/SR.29), paragraph 85; Chile, *ibid., 25th meeting* (A/C.6/71/SR.25), paragraph 100; Ireland, *ibid., 27th meeting* (A/C.6/71/SR.27), paragraph 16; and the Netherlands, *ibid., 26th meeting* (A/C.6/71/SR.26), paragraph 41.

[28] See, the United Kingdom, *ibid., 24th meeting* (A/C.6/71/SR.24), paragraph 73.

exceptions to the *non-refoulement* principle in conventions on refugees, including on grounds of national security, such exceptions are not included in more recent human rights treaties. Chapter II concludes by proposing a draft article providing for an obligation of *non-refoulement* in the context of crimes against humanity.

9. Chapter III addresses the rights and obligations of States regarding mutual legal assistance in connection with criminal proceedings, based upon the different types of mutual legal assistance provisions included in various treaties. Less detailed treaties include general obligations to afford the greatest possible measure of assistance. Treaties with more detailed provisions place some general obligations on all States parties, but also include "mini mutual legal assistance treaty" provisions. Such provisions essentially create a detailed, bilateral mutual legal assistance treaty relationship between States parties in circumstances where they do not otherwise have such a relationship (or when those States elect to use the mini mutual legal assistance treaty to facilitate cooperation). Mini mutual legal assistance treaty provisions address topics such as: transferring detained persons to another State to provide evidence; designating a central authority to handle mutual legal assistance requests; using videoconferencing for witnesses to provide testimony; and permissible and impermissible grounds for refusing mutual legal assistance requests. Chapter III concludes by proposing a draft article on mutual legal assistance most suited to issues related to crimes against humanity.

10. Chapter IV addresses the participation and protection of victims, witnesses and others in relation to proceedings within the scope of the present draft articles, as well as reparation for victims. Although prior treaties addressing crimes under national law often have not contained provisions concerning victims and witnesses, the most recent treaties do contain such provisions. Those treaties typically address the protection of victims and witnesses, as well as reparation for victims; they also sometimes address the participation of victims in legal proceedings undertaken against the alleged offender. Chapter IV concludes by proposing a draft article addressing these points.

11. Chapter V addresses the relationship of the present draft articles with the rights and obligations of States with respect to competent international criminal tribunals, such as the International Criminal Court. As a general matter, the present draft articles have been drafted so as to avoid any such conflicts. Even so, to avoid any unanticipated conflict, there is value in a provision that makes clear that the rights or obligations of a State under the constitutive instrument of a competent international criminal tribunal prevail over the rights and obligations of the State identified in the present draft articles. Chapter V concludes by proposing a draft article addressing this issue.

12. Chapter VI addresses obligations upon federal States. It reviews the practice by some States of making a unilateral declaration when signing or ratifying a treaty so as to exclude its application to part of their territories. In recent years, such declarations have been viewed with sufficient disfavour that some treaties have included articles precluding the ability of States to make such declarations. Chapter VI concludes by proposing a draft article addressing this issue.

13. Chapter VII addresses monitoring mechanisms and dispute settlement. Various monitoring mechanisms already exist that are capable of scrutinizing situations of crimes against humanity, either as such or in the context of the types of violations

(such as torture) that may occur when such crimes are committed. If States wish to establish a new monitoring mechanism, numerous treaties, especially human rights treaties, provide for a monitoring mechanism body. This body can take the form of a committee, commission, court or meeting of States parties. In addition to monitoring mechanisms, many treaties also have dispute settlement clauses. These clauses will typically obligate States parties to negotiate in the case of a dispute. Should negotiations not succeed, such clauses provide for further methods of compulsory dispute settlement, including arbitration and resort to the International Court of Justice. Chapter VII concludes by proposing a draft article addressing dispute settlement.

14. Chapter VIII addresses other issues that have arisen in the course of discussions within the Commission relating to this topic, specifically concealment of crimes against humanity, immunity and amnesty.

15. Chapter IX proposes a preamble which highlights several core elements that motivate and justify the present draft articles.

16. Chapter X addresses the issue of final clauses, in the event that the present draft articles are transformed into a convention. The Commission typically does not include final clauses as a part of its draft articles and consequently no proposal is made in that regard. Even so, this chapter discusses possible choices available to States with respect to a final clause on reservations.

17. Chapter XI addresses a future programme of work on this topic, proposing that a first reading be completed in 2017 and a second reading in 2019.

18. As a matter of convenience, annex I to this report contains the 10 draft articles provisionally adopted by the Commission to date. Annex II contains the seven draft articles and draft preamble proposed in this report.

Chapter I

Extradition

A. Extradition and crimes against humanity

19. In 1973, the General Assembly of the United Nations in its resolution 3074 (XXVIII) of 3 December 1973 highlighted the importance of international cooperation in the extradition of persons who have allegedly committed crimes against humanity, where necessary to ensure their prosecution and punishment. In that regard, the General Assembly indicated that “States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them” (para. 4). Further, “[p]ersons against whom there is evidence that they have committed ... crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons” (para. 5). Moreover, “States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of ... crimes against humanity” (para. 8). In 2001, the Sub-Commission on the Promotion and Protection of Human Rights reaffirmed the principles set forth in General Assembly resolution 3074[29] and urged “all States to cooperate in order to search for, arrest, extradite, bring to trial and punish persons found guilty of war crimes and crimes against humanity”.[30]

20. Draft article 6, paragraph 2, of the present draft articles provides that each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where an alleged offender is present in any territory under its jurisdiction, and the State does not extradite or surrender the person. When an alleged offender is present and has been taken into custody, the State is obligated under draft article 8, paragraph 3, to notify other States that have jurisdiction to prosecute the alleged offender, which may result in those States seeking the alleged offender’s extradition. Further, draft article 9 obligates the State to submit the case to its competent authorities for the purpose of prosecution, unless the State extradites or surrenders the person to another State or competent international criminal tribunal.

21. Thus, when an alleged offender is in the jurisdiction of a State, there is a possibility of that offender being extradited to another State for the purpose of prosecution.[31] When this occurs, it is useful to have in place clearly stated rights, obligations and procedures with respect to the extradition process. At present, there

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[29] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, resolution 2001/22 of 16 August 2001, Fifty-third session (E/CN.4/SUB.2/RES/2001/22), para. 3. The Sub-Commission largely replicated in its resolution the General Assembly’s principles, but with some modifications.

[30] *Ibid.*, para. 2.

[31] This chapter does not address procedures for surrender to a competent international criminal tribunal, which would be regulated by the relevant instruments associated with that tribunal.

is no global or regional convention devoted exclusively to extradition of alleged offenders for crimes against humanity. Rather, extradition of such offenders may occur pursuant to the rights, obligations and procedures set forth in multilateral[32] or bilateral extradition agreements[33] addressing crimes more generally, where they exist between a requesting State and requested State, or pursuant to national laws or policies when those are regarded as sufficient by the requested State.

22. Multilateral or bilateral extradition agreements addressing crimes generally have not led to comprehensive global coverage. The 1990 United Nations Model Treaty on Extradition is one effort to help States in developing bilateral extradition agreements capable of addressing a wide range of crimes,[34] but any given State does not have such agreements in place with all other States. Rather, most States typically will have in place such an extradition agreement with only some other States, leaving no treaty-based extradition relationship with many other States. At the same time, many States will not extradite in the absence of an extradition agreement.

23. Consequently, the approach taken for many treaties that address a particular crime, such as torture, corruption or enforced disappearance, is to include within the treaty an article providing in some detail the rights, obligations and procedures that will govern extradition between States with respect to that particular crime, in the absence of any other applicable extradition treaty. A survey of treaties that address a particular crime suggests two broad models for provisions addressing extradition. The first and less detailed approach is reflected in article 8 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which contains just four paragraphs, and article 13 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which contains seven paragraphs.

24. The second and more detailed approach may be seen in article 16 of the 2000 United Nations Convention against Transnational Organized Crime and the substantially similar article 44 of the 2005 United Nations Convention against Corruption, which contain 17 and 18 paragraphs respectively. Article 44 of the United Nations Convention against Corruption, for example, reads as follows:

> ***Article 44. Extradition***
>
> 1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

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[32] See, for example, the 1957 European Convention on Extradition. See also Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal of the European Communities*, No. L 190, 18 June 2002, p. 1.

[33] See, generally, M. Cherif Bassiouni (ed.), *International Criminal Law, Multilateral and Bilateral Enforcement Mechanisms*, vol. II, 3rd ed., Leiden, Martinus Nijhoff, 2008; and D. A. Sadoff, *Bringing International Fugitives to Justice: Extradition and its Alternatives*, Cambridge University Press, 2016.

[34] General Assembly resolution 45/116 of 14 December 1990, Annex (subsequently amended by General Assembly resolution 52/88 of 12 December 1997).

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into

custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

25. The core elements addressed in both the "less detailed" and "more detailed" approaches to extradition are analyzed in the next section. Thereafter, this chapter concludes with a proposed draft article consisting of 13 paragraphs entitled "Extradition". The proposed draft article is largely modelled after article 44 of the United Nations Convention against Corruption. At present 181 States have adhered to the text of that Convention. It provides ample guidance as to all relevant rights, obligations and procedures for extradition in the context of crimes against humanity, and its provisions are well understood by States, especially through detailed guides and other resources developed by the United Nations Office on Drugs and Crime (UNODC).[35] Further, the draft article proposed in this report on mutual legal assistance (see chapter III below) is based on the United Nations Convention against Corruption, and certain institutional structures called for in that regard — such as national contact points — could be harnessed for implementing extradition in the context of crimes against humanity. At the same time, some substantive and stylistic modifications to the text of article 44 are warranted in the context of the present draft articles.

26. It is noted that extradition treaties typically do not seek to regulate which requesting State (if any) should have priority in the event that there are multiple requests for extradition. For example, the Model Treaty on Extradition, in article 16, simply provides: "If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited."[36] Some instruments identify elements to be taken into account, but still leave the ultimate decision to the requested State.[37] A variety of factors in any given situation may suggest that one or the other requesting State is best situated to prosecute, and it is always the case that the State where the alleged offender is present may elect to submit the case to its own competent authorities for the purpose of prosecution instead of extraditing. The

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[35] See, for example, UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd rev. ed., 2012, available from www.unodc.org/unodc/en/treaties/CAC/legislative-guide.html; UNODC, *Technical Guide to the United Nations Convention against Corruption*, 2009, available from www.unodc.org/unodc/en/treaties/CAC/technical-guide.html; and UNODC, *Travaux Préparatoires of the Negotiation for the Elaboration of the United Nations Convention against Corruption*, United Nations publication (Sales No. E.10.V.13), available from www.unodc.org/unodc/en/treaties/CAC/travaux-preparatoires.html. For additional resources, visit www.unodc.org/unodc/en/corruption/publications.html. UNODC has developed similar resources for the United Nations Convention against Transnational Organized Crime, which contains many of the same provisions as the United Nations Convention against Corruption in its article on extradition. See, for example, UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, United Nations publication (Sales No. E.05.V.2), available from www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html; and the Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum: Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1).

[36] Model Treaty on Extradition (see footnote 34 above), art. 16.

[37] See, for example, Council Framework Decision of 13 June 2002 … (footnote 32 above), art. 16, p. 7.

present report makes no proposal for inclusion of a provision addressing multiple requests for extradition.

B. Extradition provisions in treaties addressing specific crimes

27. As noted in the prior section, treaties that address a particular crime, such as torture, corruption or enforced disappearance, typically include provisions addressing the rights, obligations and procedures that will govern extradition between the States parties with respect to that particular crime. While there is some variety among these agreements, the more detailed articles tend to have particular elements in common, as discussed below.

1. Dual criminality

28. One element sometimes contained in such treaties is a "dual criminality" requirement, meaning that obligations with respect to extradition only arise in circumstances where, for a specific request, the conduct at issue is criminal in both the requesting State and the requested State.[38] Such a treaty provision is typically included in two situations.

29. First, a dual criminality requirement is usually included in general extradition treaties, which are potentially capable of covering a wide array of conduct. In such circumstances, a requested State may not wish to be subject to extradition obligations with respect to conduct that it does not regard as criminal. Consequently, the dual criminality requirement is included to ensure that obligations with respect to extradition only arise if both States have criminalized the conduct at issue.

30. Second, a dual criminality requirement is usually included where the treaty is focused on a particular type of crime, but has established a combination of mandatory and non-mandatory offences, with the result that the offences existing in any two States parties may differ. For example, the United Nations Convention against Corruption establishes both mandatory (arts. 15, 16, para. 1, and arts. 17, 23, and 25) and non-mandatory (art. 16, para. 2, and arts. 18-22 and 24) offences relating to corruption. The Convention's provisions on dual criminality, contained in the first three paragraphs of article 44,[39] essentially allow a State party that has not

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[38] See, for example, M. C. Bassiouni, *International Extradition: United States Law and Practice*, 6th ed., Oxford University Press, 2014, p. 500 ("Dual criminal (also referred to as double criminality and double incrimination) refers to the characterization of the relator's conduct as criminal under the laws of both the requesting and requested states. It is a reciprocal characterization of criminality that is considered a substantive requirement for granting extradition"); and UNODC, Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, Part One: Revised Manual on the Model Treaty on Extradition, p. 10, para. 20 ("The requirement of double criminality under the laws of both the requesting and requested States of the offence for which extradition is to be granted is a deeply ingrained principle of extradition law").

[39] See also the United Nations Convention against Transnational Organized Crime, articles 16, paragraphs 1–2 ("1. This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is

adopted a non-mandatory offence to decline an extradition request relating to such an offence.[40] At the same time, the dual criminality requirement should be fulfilled among States parties with respect to all mandatory offences established under the Convention.[41]

31. By contrast, treaties addressing a particular type of crime that only establish mandatory offences typically do not contain a dual criminality requirement. Thus, treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance, which define specific offences and obligate States parties to take the necessary measures to ensure that they constitute offences under national criminal law, contain no dual criminality requirement in their respective extradition provisions. The rationale for not doing so is that when an extradition request arises under either convention, the offence should already be criminalized under the laws of both States parties, such that there is no need to satisfy a dual criminality requirement. A further rationale is that such treaties typically do not contain an absolute obligation to extradite; rather, they contain an *aut dedere aut judicare* obligation, whereby the requested State may always choose not to extradite, so long as it submits the case to its competent authorities for the purpose of prosecution.

32. The present draft articles on crimes against humanity define crimes against humanity in draft article 3 and, based on that definition, mandate in draft article 5, paragraphs 1 to 3, that the "offences" of "crimes against humanity" exist under national criminal laws of each State.[42] As such, when an extradition request from one State is sent to another State for an offence referred to in draft article 5, the offence is criminal in both States; dual criminality is automatically satisfied.

33. Draft article 3, paragraph 4, does acknowledge that the definition of the offence "is without prejudice to any broader definition provided for in any international instrument or national law" but, for purposes of the present draft articles, the "offence" of "crimes against humanity" is as defined in draft article 5, paragraphs 1 to 3. Any broader definition of "crimes against humanity" provided for in any international instrument or national law is not an "offence" referred to in draft article 5.

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punishable under the domestic law of both the requesting State Party and the requested State Party. 2. If the request for extradition includes several separate serious crimes, some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter offences").

[40] *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (see footnote 35 above), p. 152, para. 556 ("With respect to those offences whose establishment is optional and that some parties may have established while others have not, the dual criminality requirement may constitute an obstacle to extradition. In this context, article 44, paragraph 2, can be considered as an encouragement for parties to extradite in the absence of dual criminality, if their domestic law allows it").

[41] *Ibid.*

[42] Draft article 3, paragraph 4, provides that the draft article is without prejudice to a broader definition of crimes against humanity provided for in any national law. An extradition request based on an alleged offence arising outside the scope of draft article 3, paragraphs 1–3, however, is not based on an offence arising under draft article 5.

34. Draft article 5, paragraph 7, addresses the liability of legal persons for the "offences" referred to in draft article 5 (hence referring to paragraphs 1 to 3), and indicates that such liability "may be criminal, civil or administrative". Thus, there may be divergences among the national laws of States when addressing the liability of legal persons. Yet such divergences are not with respect to the "offences" of "crimes against humanity" but, rather, with respect to the liability of legal persons for such offences. In any event, extradition procedures concern the transfer of natural persons.

35. Draft article 6, paragraph 1, allows for some differential treatment as among States in the establishment of jurisdiction over offenders. At the same time, in the context of an extradition request, the requested State is the State in which the alleged offender is present, which falls within the scope of draft article 6, paragraph 2, for which there is no differential treatment. Even if the requesting State seeks to exercise a type of national jurisdiction that has not been established by the requested State (for example, jurisdiction based on the nationality of the victim), the salient point is that the *offence* at issue is criminal in both the requesting and requested States. The requested State can chose not to extradite if it does not approve of the type of national jurisdiction that the requesting State seeks to exercise, but the requested State must then submit the case to its competent authorities for the purpose of prosecution, pursuant to draft article 9.

36. In light of the above, there appears to be no need to include in a draft article on extradition a dual criminality requirement such as appears in the first three paragraphs of article 44 of the United Nations Convention against Corruption.

2. Inclusion as an extraditable offence in existing and future treaties

37. A second element typically contained in such treaties is an obligation on States parties to regard the offence identified in the treaty as an extraditable offence both in existing treaties that address extradition generally and in any future such treaties concluded between State parties.[43]

38. For example, article 8, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "[t]he offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them".

39. Likewise, article 13, paragraphs 2 and 3, of the International Convention for the Protection of All Persons from Enforced Disappearance provides:

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[43] See article 7 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook ... 1972*, vol. II, pp. 319–320; and article 10 of the draft code of crimes against the peace and security of mankind, *Yearbook...1996*, vol. II (Part Two), pp. 32–33. See also J. J. Lambert, *Terrorism and Hostages in International Law: Commentary on the Hostages Convention 1979*, Cambridge University Press 1990, p. 229; and J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: a Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrech, Martinus Nijhoff, 1988, pp. 138–139 and 238.

> **2. The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of this Convention.**
>
> **3. States Parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them.[44]**

40. Similar provisions appear in: the 1970 Convention for the suppression of unlawful seizure of aircraft;[45] 1971 Convention for the suppression of unlawful acts against the safety of civil aviation;[46] the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[47] the 1979 International Convention against the taking of hostages;[48] the 1994 Convention on the Safety of United Nations and Associated Personnel;[49] the 1997 International Convention for the Suppression of Terrorist Bombings;[50] the United Nations Convention against Transnational Organized

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[44] There was some concern during drafting that, as then written, it might not be "possible to require States parties to include enforced disappearance among the extraditable offences in every extradition treaty they concluded (art. 13, para. 3), since a contracting party or contracting parties that did not accede to the instrument might not agree" (Commission on Human Rights, Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 110). Various wording changes were suggested, along with using the language in article 8, paragraphs 1 and 3, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*ibid.*, paras. 110–114). The final text of article 13, paragraph 3, reflects the language used in article 8, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("State Parties undertake to include…").

[45] Art. 8, para. 1 ("The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them").

[46] Art. 8, para. 1 ("The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them").

[47] Art. 8, para. 1 ("To the extent that the crimes set forth in article 2 are not listed as extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them"). For the Commission's analysis of this provision, see *Yearbook* … 1972, vol. II, p. 319, paragraphs (1)-(3).

[48] Art. 10, para. 1 ("The offences set forth in article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them").

[49] Art. 15, para. 1 ("To the extent that the crimes set out in article 9 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them").

[50] Art. 9, para. 1 ("The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them").

Crime;[51] and regional treaties.[52] It is also noted that the Commission's 1996 draft code of crimes against the peace and security of mankind provides in article 10, paragraph 1, that, "[t]o the extent that the crimes set out in articles 17, 18, 19 and 20 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them".[53]

41. Article 44, paragraph 4, of the United Nations Convention against Corruption contains such language, and provides a suitable basis for a paragraph within a draft article on extradition (see draft article 11, paragraph 1, below). At the same time, paragraph 4 adds a further element barring use of the "political offence" exception, which is addressed in the next section.

3. Exclusion of the "political offence" exception to extradition

42. A third element typically contained in such treaties excludes the "political offence" exception from being applied to certain crimes, meaning that it requires that the extradition proceed even if the offence for which extradition is requested might be regarded by the requested State as an offence of a political nature.

43. Under some extradition treaties addressing crimes, the requested State may decline to extradite if it regards the offence for which extradition is requested as political in nature, such as criminalizing as "treason" conduct that is in the nature of activism seeking political change.[54] Yet "the rise of terrorism and other forms of international and transnational criminality is causing some governments to make an about-face and to seek to exclude the exception for international crimes and for serious crimes of violence".[55]

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[51] Art. 16, para. 3 ("Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them").

[52] See article 13 of the 1985 Inter-American Convention to Prevent and Punish Torture, which reads, in relevant part: "The crime referred to in Article 2 shall be deemed to be included among the extraditable crimes in every extradition treaty entered into between States Parties. The States Parties undertake to include the crime of torture as an extraditable offence in every extradition treaty to be concluded between them"; article V of the 1994 Inter-American Convention on Forced Disappearance of Persons, which reads, in relevant part: "The forced disappearance of persons shall be deemed to be included among the extraditable offenses in every extradition treaty entered into between States Parties"; and article XIII, paragraph 2, of the 2007 ASEAN [Association of Southeast Asian Nations] Convention on Counter Terrorism, which reads, in relevant part: "The offences covered in Article II of this Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Convention."

[53] *Yearbook ... 1996*, vol. II (Part Two), p. 32.

[54] For a general discussion of political offences and the political offence exception, see G. Gilbert, *Aspects of Extradition Law*, Dordrecht, Martinus Nijhoff, 1991, pp. 113 *et seq.*

[55] Bassiouni, *International Extradition* (see footnote 38 above), pp. 669–739, at p. 671. There has also been movement towards not including the political offence exception in its entirety. See Council Framework Decision of 13 June 2002 ... (footnote 32 above); and the United Kingdom Extradition Act, 2003 c. 41, available from www.legislation.gov.uk/ukpga/2003/41/contents.

44. In particular, there is support for the proposition that crimes such as genocide, crimes against humanity and war crimes should not be regarded as "political offences". For example, article VII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide states that its enumerated offences are not subject to any exception founded on political offence grounds: "Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition" (art. VII).[56] Commentators have noted that, given that the aim of the Convention was "to prevent impunity in the case of genocide", article VII "was not a controversial issue in the drafting history"[57] and was "accepted, without much controversy, by a majority of countries as a central provision in the Genocide Convention".[58]

45. There are similar reasons not to regard alleged crimes against humanity as a "political offence" so as to preclude extradition.[59] Indeed, the Revised Manual on the Model Treaty on Extradition states that "certain crimes, such as genocide, crimes against humanity and war crimes, are regarded by the international community as so heinous that the perpetrators cannot rely on this restriction on extradition".[60] The Sub-Commission on the Promotion and Protection of Human Rights has also declared that persons "charged with war crimes and crimes against humanity shall not be allowed to claim that their actions fall within the 'political offence' exception to extradition".[61]

46. Several other multilateral treaties addressing specific crimes contain provisions barring the "political offence" exception, including: the International

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[56] See, generally, R. Roth, "The extradition of *génocidaires*", in P. Gaeta (ed.), *The UN Genocide Convention: a Commentary*, Oxford University Press, 2009 p. 279, at p. 283.

[57] Roth (see footnote above), p. 279. See also B. Schiffbauer, in C. J. Tams, L. Berster and B. Schiffbauer (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: a Commentary*, Munich, C. H. Beck, 2014, pp. 262–263. For the negotiating history of the Convention, see H. Abtahi and P. Webb, *The Genocide Convention: the Travaux Préparatoires*, Leiden, Martinus Nijhoff, 2008 (two volumes).

[58] Roth (see footnote 56 above), p. 284. See also Economic and Social Council, Ad Hoc Committee on Genocide, Report of the Committee and Draft Convention Drawn up by the Committee (E/794), p. 37; and *Official Records of the General Assembly, Thirty-first session, Sixth Committee, 55th meeting* (A/C.6/31/SR.55), pp. 8–9, especially paragraph 30 (statement of Australia referencing war crimes, genocide and violations of human rights as crimes for which "any such political character should not prevent extradition").

[59] See, for example, *In the Matter of the Extradition of Mousa Mohammed Abu Marzook*, United States District Court, S. D. New York, 924 F. Supp. 565 (1996), p. 577 ("if the act complained of is of such heinous nature that it is a crime against humanity, it is necessarily outside the political offense exception"); *Ordinola* v. *Hackman*, United States Court of Appeals, Fourth Circuit, 478 F.3d 588 (2007) (providing an overview of the political offence doctrine in U.S. law); and *Nezirovic* v. *Holt*, United States Court of Appeals, Fourth Circuit, 779 F.3d 233 (2015) (holding that the political offence exception is not applicable to acts of torture committed during the conflict in Bosnia).

[60] Revised Manual on the Model Treaty on Extradition (see footnote 38 above), para. 45.

[61] Sub-Commission on the Promotion and Protection of Human Rights, resolution 2001/22 (see footnote 29 above).

Convention for the Suppression of Terrorist Bombings;[62] the 1999 International Convention for the Suppression of the Financing of Terrorism;[63] and the International Convention for the Protection of All Persons from Enforced Disappearance.[64] Contemporary bilateral extradition treaties also often specify particular offences that should not be regarded as a "political offence" so as to preclude extradition.[65] Neither the International Convention against the taking of hostages[66] nor the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[67] however, contain a provision barring the political offence exception to extradition.

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[62] Art. 11 ("None of the offences set forth in article 2 shall be regarded, for purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives").

[63] Art. 14 ("None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives").

[64] Art. 13, para. 1 ("For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone").

[65] See, for example, the Extradition Treaty Between the United States of America and South Africa, done at Washington on 16 September 1999, available from www.state.gov/documents/organization/124464.pdf, article 4, paragraph 2 ("For the purposes of this Treaty, the following offences shall not be considered political offences: ... (b) an offence for which both the Requesting and Requested States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their respective competent authorities for decision as to prosecution; (c) murder; (d) an offence involving kidnapping, abduction, or any form of unlawful detention, including the taking of a hostage"); the Treaty on Extradition Between the Republic of Korea and Australia, done at Seoul on 5 September 1990, available from www.oecd.org/site/adboecdanti-corruptioninitiative/39362515.pdf, article 4, paragraph 1 (a) ("... Reference to a political offence shall not include ... (ii) an offence in respect of which the Contracting Parties have the obligation to establish jurisdiction or extradite by reason of a multilateral international agreement to which they are both parties; and (iii) an offence against the law relating to genocide"); and the Treaty of Extradition Between the Government of Canada and the Government of the United Mexican States, done at Mexico City on 16 March 1990, available from www.oas.org/juridico/mla/en/traites/en_traites-ext-can-mex.html, article IV, subparagraph a) ("... For the purpose of this paragraph, political offence shall not include an offence for which each Party has the obligation, pursuant to a multilateral international agreement, to extradite the person sought or to submit the case to its competent authorities for the purpose of prosecution"). See also Bassiouni, *International Extradition* (see footnote 38 above), p. 670.

[66] See also B. Saul, "International Convention against the Taking of Hostages", introductory note, United Nations Audiovisual Library of International Law, available from http://legal.un.org/avl/ha/icath/icath.html.

[67] See also M. Nowak and E. McArthur, *The United Nations Convention against Torture: a Commentary*, Oxford University Press, 2008, p. 373 (noting that "Switzerland feared that the motives for acts of torture might be such as to permit torturers to invoke the political nature of their actions as an argument against their extradition" and suggesting that a statement be added

47. Article 44, paragraph 4, of the United Nations Convention against Corruption contains a final sentence that reads: "A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence." This language limits the exclusion of the political offence exception only to extraditions occurring under the Convention itself. A broader exclusion of the political offence exception to all extraditions occurring between two States parties is found in article 13, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance, which reads: "For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone."

48. Broader language of this kind would be preferable for a draft article on extradition (see draft article 11, paragraph 2, below).

49. It is noted that the key aspect of such language is to clarify that the *conduct* of committing a crime against humanity can never be regarded as a "political offence" (in other words, that such conduct itself cannot be regarded as some form of political activism). This issue differs, however, from whether a requesting State is *pursuing the extradition* on account of the individual's political opinions; in other words, it differs from whether the State is alleging a crime against humanity and making its request for extradition as a means of persecuting an individual for his or her political views. The latter issue of persecution is addressed separately below.

4. States requiring a treaty to extradite can use the present draft articles

50. A fourth element establishes the treaty itself as a possible legal basis for extradition, for the benefit of States that condition extradition upon the existence of a treaty.[68] Article 44, paragraph 5, of the United Nations Convention against Corruption contains an example of such a provision. It reads: "If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies."

51. The same or a similar provision may be found in the Convention for the suppression of unlawful seizure of aircraft;[69] the Convention for the suppression of

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that the acts defined in the Convention "shall not be deemed to be offences of a political nature").

[68] See Lambert (footnote 43 above),pp. 238–239; and L. M. Olson, "Re-enforcing enforcement in a specialized convention on crimes against humanity: inter-State cooperation, mutual legal assistance, and the *aut dedere aut judicare* obligation", in L. N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, 2011, pp. 323–344, at p. 330.

[69] Art. 8, para. 2 ("If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence").

unlawful acts against the safety of civil aviation;[70] the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[71] the International Convention against the taking of hostages;[72] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[73] the International Convention for the Suppression of Terrorist Bombings;[74] the International Convention for the Suppression of the Financing of Terrorism;[75] the United Nations Convention against Transnational Organized Crime;[76] and the International Convention for the Protection of All Persons from Enforced Disappearance.[77] The Commission's 1996 draft code of crimes against the peace and security of mankind also contained such a provision.[78]

52. In addition to this provision, and unlike other treaties, both the United Nations Convention against Transnational Organized Crime,[79] in its article 16, paragraph 5,

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[70] Art. 8, para. 2 (same language as the Convention for the suppression of unlawful seizure of aircraft).

[71] Art. 8, para. 2 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, if it decides to extradite, consider this Convention as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the procedural provisions and the other conditions of the law of the requested State"). For the Commission's analysis, see *Yearbook ... 1972*, vol. II, pp. 319–320.

[72] Art. 10, para. 2 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State may at its option consider this Convention as the legal basis for extradition in respect of the offences set forth in article 1. Extradition shall be subject to the other conditions provided by the law of the requested State").

[73] Art. 8, para. 2 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State").

[74] Art. 9, para. 2 ("When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State").

[75] Art. 11, para. 2 (same text as the International Convention for the Suppression of Terrorist Bombings).

[76] Art. 16, para. 4 ("If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies").

[77] Art. 13, para. 4 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance").

[78] *Yearbook ... 1996*, vol. II (Part Two), p. 32, art. 10, para. 2 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State").

[79] Art. 16, para. 5 (a) ("States Parties that make extradition conditional on the existence of a treaty shall ... [a]t the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they

and the United Nations Convention against Corruption,[80] in its article 44, paragraph 6, include a requirement in their subparagraph (*a*) that any State party that makes extradition conditional on the existence of a treaty notify the depositary whether it intends to treat the Convention as the legal basis for extradition to or from States with whom they do not have an extradition treaty. Further, in subparagraph (*b*), these Conventions both provide that if the State party does not regard the Convention as the legal basis for extradition, it shall "seek, where appropriate, to conclude treaties on extradition with other States Parties".

53. One commentator asserts that subparagraph (*a*) "seeks to make transparent the process envisaged in [using the Convention as a legal basis for extradition] by requiring States Parties to make it clear whether they are exercising the optional power to take the Convention as the legal basis for cooperation".[81] Yet whether the provision has been effective in providing for transparency is unclear. For example, as of 2016 only about 50 out of 181 States parties to the United Nations Convention against Corruption had provided notification to the Secretary-General as to whether they intended to treat the Convention as the legal basis for extradition to or from States with whom they do not have an extradition treaty.[82] Thus, for more than two thirds of the States parties, it is not clear whether they regard the Convention as the legal basis for extradition to or from States with whom they do not have an extradition treaty.

54. Subparagraph (*b*) obliges a State party that does not use the Convention as the legal basis for extradition to conclude extradition treaties, "as appropriate", with other States parties. Despite the "as appropriate" clause, a report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime asserts that "those States which require a treaty basis and do not take the Convention as the legal basis for extradition have an obligation under paragraph 5 to seek to conclude with other parties treaties on extradition in order to strengthen international cooperation in criminal matters as a stated purpose of the Convention".[83]

55. In light of the above, article 44, paragraph 6, of the United Nations Convention against Corruption provides a suitable basis for a paragraph within a draft article on extradition. Yet the text of subparagraph (*a*) could be altered to establish a default in favour of using the draft articles as a basis for extradition,

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will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention").

[80] Art. 44, para. 6 (same text as the United Nations Convention against Transnational Organized Crime).

[81] D. McClean, *Transnational Organized Crime: a Commentary on the UN Convention and its Protocols*, Oxford University Press, 2007, p. 180.

[82] A list of "Notifications made under article 6 (3), 44 (6)(a) and 46 (13) and (14)" of the 2003 United Nations Convention against Corruption may be found on the United Nations Treaty Collection database, at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&clang=_en#top.

[83] Conference of the Parties to the 2000 United Nations Convention against Transnational Organized Crime, Analytical report of the Secretariat on the Implementation of the United Nations Convention against Transnational Organized Crime: updated information based on additional responses received from States for the first reporting cycle (CTOC/COP/2005/2/Rev.1), para. 69.

unless the State notifies the depositary otherwise (see draft article 11, paragraph 4, below). Doing so would provide a strong incentive for States to be transparent as to whether they intend to treat the draft articles as a legal basis for extradition.

5. States not requiring a treaty to extradite shall use the present draft articles

56. A fifth element provides that a State party that does *not* make extradition conditional on the existence of a treaty shall recognize the offences identified in the treaty as extraditable offences between itself and other States parties. Such a provision appears at article 44, paragraph 7, of the United Nations Convention against Corruption. It reads: "States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves."

57. Similar provisions may be found in many other treaties addressing crimes, including the Convention for the suppression of unlawful seizure of aircraft;[84] the Convention for the suppression of unlawful acts against the safety of civil aviation;[85] the International Convention against the taking of hostages;[86] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[87] and the International Convention for the Protection of All Persons from Enforced Disappearance.[88] The Commission's 1996 draft code of crimes against the peace and security of mankind also contains such a provision.[89]

58. In light of the above, article 44, paragraph 7, of the United Nations Convention against Corruption provides a suitable basis for a paragraph within a draft article on extradition (see draft article 11, paragraph 5, below).

6. Satisfying other requirements of the requested State's national law

59. A sixth element provides that the extradition is otherwise subject to the conditions or requirements set forth in the law of the requested State. Such a provision appears at article 44, paragraph 8, of the United Nations Convention against Corruption. It reads: "Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty

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[84] Art. 8, para. 3 ("Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State").

[85] Art. 8, para. 3 (same text as the Convention for the suppression of unlawful seizure of aircraft).

[86] Art. 10, para. 3 ("States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 1 as extraditable offences between themselves subject to the conditions provided by the law of the requested State").

[87] Art. 8, para. 3 ("States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State").

[88] Art. 13, para. 5 ("States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves").

[89] *Yearbook ... 1996*, vol. II (Part Two), p. 32, art. 10, para. 3 ("States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State").

requirement for extradition and the grounds upon which the requested State Party may refuse extradition."

60. Similar provisions may be found in the Convention for the suppression of unlawful seizure of aircraft;[90] the Convention for the suppression of unlawful acts against the safety of civil aviation;[91] the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[92] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[93] the Convention on the Safety of United Nations and Associated Personnel;[94] the International Convention for the Suppression of Terrorist Bombings;[95] the International Convention for the Suppression of the Financing of Terrorism;[96] the United Nations Convention against Transnational Organized Crime;[97] and the International Convention for the Protection of All Persons from Enforced Disappearance.[98] Regional conventions also contain similar language.[99]

61. Such provisions have not been controversial. For example, the negotiating history of the United Nations Convention against Corruption reveals that article 44, paragraph 8, was maintained in identical form throughout the negotiations and that there were no notable objections to the text or suggestions for change.[100]

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[90] Article 8, paragraph 2, reads, in relevant part: "Extradition shall be subject to the other conditions provided by the law of the requested State."

[91] Article 8, paragraph 2, reads in relevant part: "Extradition shall be subject to the other conditions provided by the law of the requested State."

[92] Article 8, paragraph 2, reads, in relevant part: "Extradition shall be subject to the procedural provisions and the other conditions of the law of the requested State."

[93] Article 8, paragraph 2, reads, in relevant part: "Extradition shall be subject to the other conditions provided by the law of the requested State."

[94] Article 15, paragraph 2, reads, in relevant part: "Extradition shall be subject to the conditions provided in the law of the requested State."

[95] Article 9, paragraph 2, reads, in relevant part: "Extradition shall be subject to the other conditions provided by the law of the requested State."

[96] Article 11, paragraph 2, reads, in relevant part: "Extradition shall be subject to the other conditions provided by the law of the requested State."

[97] Article16, paragraph 7, reads: "Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition."

[98] Art. 13, para. 6 ("Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, in particular, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions").

[99] See, for example, article 13 of the Inter-American Convention to Prevent and Punish Torture, which reads, in relevant part: "Extradition shall be subject to the other conditions that may be required by the law of the requested State"; article V of the Inter-American Convention on Forced Disappearance of Persons, which reads, in relevant part: "Extradition shall be subject to the provisions set forth in the constitution and other laws of the request[ed] state"; and the 1999 Council of Europe Criminal Law Convention on Corruption, article 27, paragraph 4 ("Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition").

[100] See the Travaux Préparatoires *of the Negotiation for the Elaboration of the United Nations*

62. The wording of the provision allows the rules on extradition commonly included in a requested State's national laws to continue to operate. Such laws might: include a requirement that an extradition only proceed if the offence at issue is punishable by a certain minimum penalty, such as imprisonment of one year;[101] prohibit the extradition of the requested State's nationals; prohibit extradition if the request is related to a trial that was conducted *in absentia*; or require that an extradited person only can be extradited to face the charge for which extradition was requested (the principle of specialty or speciality).[102] Whatever the reason, in the context of the present draft articles, it should be kept in mind that the requested State in which the offender is present is obligated to submit the matter to prosecution under draft article 9 unless it extradites or surrenders the alleged offender. Thus, while the requested State's national law may preclude extradition to a requesting State in certain circumstances, the requested State remains obliged to submit the matter to its prosecuting authorities.[103]

63. The United Nations Convention against Transnational Organized Crime[104] and the United Nations Convention against Corruption contain an additional provision relating to the national law of the requested State, which essentially encourages the requested State to streamline its extradition procedures to the extent permissible under national law. Thus, article 44, paragraph 9, of the United Nations Convention against Corruption reads: "States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies."

64. In light of the above, article 44, paragraphs 8 and 9, of the United Nations Convention against Corruption provides a suitable basis for paragraphs within a draft article on extradition (see draft article 11, paragraphs 6 and 7, below).

7. Deeming the offence to have occurred in the requesting State

65. A seventh element allows for the situation in which the offence has not occurred in the requesting State. Some treaties and national laws provide that the requested State is only required to grant a request for extradition if it was made by the State in which the crime occurred.[105] To counter such a rule, many treaties have included a provision stating that the offence at issue should be deemed to have occurred not only in the State where it physically occurred, but also in any State that

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Convention against Corruption (footnote 35 above), pp. 345–361.

[101] See, for example, Bassiouni, *International Extradition* (footnote 38 above), p. 511.

[102] See, for example, the United Kingdom Extradition Act (footnote 55 above), section 17.

[103] See Saul (footnote 66 above) ("National law continues to govern the preconditions of extradition to the extent not modified by the Convention. Thus, for instance, States which refuse to extradite their nationals may continue not to do so; or States could still insist on satisfaction of the 'specialty' rule (namely, that an extradited person can only be extradited to face the charge for which extradition was requested). The State must then submit the case for prosecution").

[104] Art. 16, para. 8 ("States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies").

[105] *Yearbook … 1996*, vol. II (Part Two), p. 33, para. (3) of the commentary to draft article 10 ("Under some treaties and national laws, the custodial State may only grant requests for extradition coming from the State in which the crime occurred").

is required to establish jurisdiction over the offence under the treaty, if such an approach is necessary for the extradition to proceed. Thus, article 8, paragraph 4, of the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, provides that "[e]ach of the crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of article 3".

66. Notably, the above provision was not included in the Commission's draft articles that served as the basis of the Convention,[106] but was inserted by the Sixth Committee in the final text.[107] Provisions with substantially similar language may be found in the Convention for the suppression of unlawful seizure of aircraft;[108] the Convention for the suppression of unlawful acts against the safety of civil aviation;[109] the International Convention against the taking of hostages;[110] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[111] the Convention on the Safety of United Nations and Associated Personnel;[112] and the International Convention for the Suppression of Terrorist Bombings.[113] A recent formulation may be found in article 11, paragraph 4, the

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[106] See *Yearbook ... 1972*, vol. II, pp. 319–320, article 7; *Official Records of the General Assembly, Twenty-eighth session, Sixth Committee, 1437th meeting* (A/C.6/SR.1437), paragraphs 27–28 (considering that the Commission's proposed article 7, paragraph 4, dealing with conflicting extradition requests "established too rigid a system of priorities", and noting that it had been replaced by text suggested by Japan in document A/C.6/L.934). See also *ibid., 1419th meeting* (A/C.6/SR.1419), paragraphs 15–16 (Japan introduced its amendment to bring article 7, paragraph 4 "into line with the corresponding provision of the Conventions of The Hague and Montreal" because the "delegation felt that the text of the Conventions of The Hague and Montreal in that particular paragraph was essential to enable certain States to put their extradition mechanism in motion when they received requests for extradition from States other than the State where offences were committed").

[107] See the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, article 8, paragraph 4.

[108] Art. 8, para. 4 ("The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4, paragraph 1").

[109] Art. 8 para. 4 (same language as the Convention for the suppression of unlawful seizure of aircraft).

[110] Art. 10, para. 4 ("The offences set forth in article 1 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States required to establish jurisdiction in accordance with paragraph 1 of article 5").

[111] Art. 8, para. 4 ("Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1").

[112] Art. 15, para. 4 ("Each of those crimes shall be treated, for the purposes of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of article 10").

[113] Art. 9, para. 4 ("If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in

International Convention for the Suppression of the Financing of Terrorism: "If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 7, paragraphs 1 and 2."

67. Provisions of this kind refer to "States that have established jurisdiction" on the basis of a territorial, nationality or passive personality connection (article 7, paragraphs 1 and 2, of the International Convention for the Suppression of the Financing of Terrorism); they do not refer to a State that has established jurisdiction on the basis of the presence of the offender (article 7, paragraph 4, of the Convention). The reason for not referring to the latter State is that the State requesting extradition is never the State in which the alleged offender is present, and therefore there is no need for the requested State to deem that the offence at issue has occurred in a State that has established jurisdiction on the basis of the presence of the offender.

68. In its commentary to the 1996 draft code of crimes against the peace and security of mankind, which contains a similar provision in article 10, paragraph 4,[114] the Commission stated that "[p]aragraph 4 secures the possibility for the custodial State to grant a request for extradition received from any State party … with respect to the crimes" established in the draft code, and that "[t]his broader approach is consistent with the general obligation of every State party to establish its jurisdiction over [those] crimes".[115] Such an approach also "finds further justification in the fact that the Code does not confer primary jurisdiction on any particular States nor establish an order of priority among extradition requests".[116]

69. Such a provision, however, has not been included in some recent conventions, notably the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the International Convention for the Protection of All Persons from Enforced Disappearance. Even so, it appears that the provision may still have value in situations where extradition is problematic for a requested State because the crime against humanity did not physically occur in the requesting State, but where the requesting State has established jurisdiction in accordance with draft article 6, paragraph 1 or 2.[117] As such, inclusion of such a provision in the draft article on extradition, based on the International Convention for the Suppression of the Financing of Terrorism and with a cross reference to draft article 6 of the present draft articles, appears warranted (see draft article 11, paragraph 8, below).

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accordance with article 6, paragraphs 1 and 2").

[114] *Yearbook … 1996*, vol. II (Part Two), p. 32 ("Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party").

[115] *Ibid.*, p. 33 (para. (3) of the commentary to article 10).

[116] *Ibid.*

[117] Thus, this provision would apply to circumstances where the requesting State has established national jurisdiction under draft article 6 other than on the basis that the crime against humanity occurred in its territory.

8. Extradition of a requested State's own nationals

70. An eighth element, found in article 16, paragraphs 10 to 12, of the United Nations Convention against Transnational Organized Crime[118] and in article 44, paragraphs 11 to 13, of the United Nations Convention against Corruption, concerns situations where a requested State is limited in its ability to extradite its own nationals.

71. These paragraphs address three issues. First, if a State cannot extradite one of its nationals under its national law, it is obligated to submit the case without undue delay to its own authorities for the purpose of prosecution. Such a provision appears in article 44, paragraph 11, of the United Nations Convention against Corruption. Given draft article 9 of the present draft articles, a paragraph of this kind in a draft article on extradition appears unnecessary.

72. Second, these paragraphs deal with the situation where the requested State can extradite one of its nationals, but only if the alleged offender will be returned to the requested State for the purpose of serving out any sentence imposed by the requesting State. In such a situation, the provision makes clear that an extradition subject to such a condition is a permissible way of satisfying the requested State's *aut dedere aut judicare* obligation. Such a provision appears in article 44, paragraph 12, of the United Nations Convention against Corruption, and would appear appropriate for a draft article on extradition (see draft article 11, paragraph 9, below).

73. Third, these paragraphs address the situation where extradition of the requested State's national is being sought for the purpose of enforcing a sentence, such as in a situation where the offender was tried but has not yet served or fully served his or her sentence, and is found in his or her State of nationality. The two above-mentioned Conventions provide that the requested State shall, if its national law so permits, consider itself enforcing the sentence or the remainder thereof. Such a provision appears in article 44, paragraph 13, of the United Nations Convention against Corruption, and would appear appropriate for a draft article on extradition (see draft article 11, paragraph 10, below).

9. Refusal to extradite due to possible persecution

74. A ninth element, found in many conventions, is based on the principle "that an individual should not be extradited to a State in which he might be persecuted or prejudiced for reasons extraneous to his guilt of the charged offence".[119] Such a provision appears in article 16, paragraph 14, of the United Nations Convention against Transnational Organized Crime,[120] and in article 44, paragraph 15, of the United Nations Convention against Corruption, which reads as follows:

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[118] Art 16, paras. 10–12.

[119] Lambert (see footnote 43 above), p. 211.

[120] Article 16, paragraph 14, reads: "Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons."

> Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.[121]

75. Strictly speaking, this provision does not appear necessary in a treaty containing provisions obligating a State to establish jurisdiction when an alleged offender is present and to submit the matter to prosecution, unless the individual is extradited. Such a treaty does not create any obligation to extradite, let alone an obligation where the individual might be at risk of harm. Rather, the State can refuse to extradite for whatever reasons it choses, so long as it submits the matter to its own competent authorities for the purpose of prosecution.

76. Nevertheless, various multilateral instruments similar in nature to the present draft articles contain such a provision, such as: the International Convention against the taking of hostages;[122] the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;[123] the International Convention for the Suppression of Terrorist Bombings;[124] the International Convention for the Suppression of the Financing of Terrorism;[125] and the International Convention for the Protection of All Persons from Enforced Disappearance.[126] The provision also

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[121] For a discussion of what is meant by "substantial grounds" in *non-refoulement* provisions, which cover more than just extradition, see chapter II above.

[122] Article 9 reads, in relevant part: "A request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State Party has substantial grounds for believing: (a) that the request for extradition for an offence set forth in article 1 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion."

[123] Art. 6, para. 6 ("In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request").

[124] Art. 12 ("Nothing in this Convention shall be interpreted as imposing an obligation to extradite … if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 … has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion").

[125] Art. 15 ("Nothing in this Convention shall be interpreted as imposing an obligation to extradite … if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 … has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons").

[126] Art. 13, para. 7 ("Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons").

commonly appears in bilateral extradition agreements[127] and in national laws[128] and is included in the Model Treaty on Extradition.[129]

77. The inclusion of such a provision highlights, in particular, the ability of States to refuse extradition in cases where there are substantial grounds for believing that the individual sought is being or will be persecuted for the reasons outlined. In doing so, the provision appears to serve three purposes. First and foremost, it helps ensure that individuals will not be extradited when there is a danger that their rights

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[127] See, for example, the Extradition Agreement between the Government of the Republic of India and the Government of the French Republic, done at Paris on 24 January 2003, available from http://cbi.nic.in/interpol/ext_treaties/France.pdf, article 3, paragraph 3 ("Extradition shall also not be granted if the Requested State has substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person on account of his or her race, religion, nationality or political opinion, or that the position of that person sought may be prejudiced for any of these reasons"); the Extradition Treaty Between the United States of America and South Africa (footnote 65 above), article 4, paragraph 3 ("… extradition shall not be granted if the executive authority of the Requested State determines that there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, or political opinion"); the Treaty on Extradition Between the Republic of Korea and Australia (footnote 65 above), article 4, paragraph 1 (b) ("Extradition shall not be granted under this Treaty … if there are substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person for any reason which would be grounds for refusing extradition under the law of the Requested Party [or] that that person's position may be prejudiced for any of those reasons"); and the Treaty of Extradition Between the Government of Canada and the Government of the United Mexican States (footnote 65 above), article IV ("Extradition shall not be granted … if there are substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality or political beliefs or, that in the circumstances of the case, extradition would be inconsistent with the principles of fundamental justice").

[128] See, for example, the Extradition Law of the People's Republic of China: Order of the President of the People's Republic of China, No. 42, adopted at the 19th Meeting of the Standing Committee of the Ninth National People's Congress on 28 December 2000, available from www.oecd.org/site/adboecdanti-corruptioninitiative/39776447.pdf, article 8, paragraph 4 ("The request for extradition made by a foreign state to the People's Republic of China shall be rejected if … the person sought is one against whom penal proceedings instituted or punishment may be executed for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings"); and the United Kingdom Extradition Act (footnote 55 above), section 13 ("A person's extradition … is barred by reason of extraneous considerations if (and only if) it appears that (a) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions").

[129] Model Treaty on Extradition (see footnote 34 above), art. 3, para. (b) ("If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons"). See also the Revised Manual on the Model Treaty on Extradition (footnote 38 above), paragraph 47 ("Subparagraph (b) … is a non-controversial paragraph, one that has been used (sometimes in a modified form) in extradition treaties throughout the world").

will be violated. Second, States which already insert a similar provision into their extradition treaties or national laws are assured that substantial grounds for believing that a person will be subjected to persecution will remain a basis of refusal for extradition. Third, States which do not have such a provision explicitly in their bilateral arrangements will have a textual basis for refusal if such a case arises.

78. As such, the inclusion of such a provision in a draft article on extradition appears warranted (see draft article 11, paragraph 11, below). Consideration might be given to adding the "or membership in a particular social group" at the end of the list of factors, as is done in the International Convention for the Protection of All Persons from Enforced Disappearance. In any event, it is stressed that, in the context of the present draft articles, draft article 9 still requires the requested State, if it does not extradite, to submit the matter to its own prosecutorial authorities.

10. Consultation and cooperation

79. A tenth element seeks to promote consultation between States when a request for extradition is made and encourage general cooperation among States to carry out or enhance the effectiveness of extradition.

80. With respect to consultation, article 44, paragraph 17, of the United Nations Convention against Corruption provides that, "[b]efore refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation". An identical provision is found in the United Nations Convention against Transnational Organized Crime.[130]

81. With respect to cooperation, article 44, paragraph 18, of the United Nations Convention against Corruption, provides that "States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition". Similar provisions are included in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[131] and the United Nations Convention against Transnational Organized Crime.[132]

82. The inclusion of provisions based on article 44, paragraphs 17 and 18, in a draft article on extradition appears warranted (see draft article 11, paragraphs 12 and 13, below).

C. Draft article 11. Extradition

83. In light of the sources indicated above, the Special Rapporteur is of the view that a draft article on extradition for crimes against humanity should be largely modelled on the text used in article 44 of the United Nations Convention against Corruption. At present, 181 States have adhered to the text of that Convention. Its

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[130] Art. 16, para. 16 ("Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation").

[131] Art. 6, para. 11 ("The Parties shall seek to conclude bilateral and multilateral agreements to carry out or to enhance the effectiveness of extradition").

[132] Ar. 16, para. 17 ("States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition")

provisions would provide useful guidance as to all relevant rights, obligations and procedures for extradition in the context of crimes against humanity and are well understood by States, including through the legislative guides and other resources developed by the UNODC.[133] Further, although a crime against humanity by its nature is quite different from a crime of corruption, the issues arising in the context of extradition are largely the same regardless of the nature of the crime. Finally, the provision proposed in this report on mutual legal assistance (see chapter III below) is based on the United Nations Convention against Corruption, and certain institutional structures called for in that regard — such as national contact points — could be harnessed for implementing extradition in the context of crimes against humanity.

84. At the same time, some modifications to the text of article 44 of the United Nations Convention against Corruption are warranted in the context of crimes against humanity. Certain stylistic changes are necessary for consistency with the draft articles already provisionally adopted, such as changing: "article" to "draft article"; "this Convention" to "the present draft articles"; "domestic law" to "national law"; and "State Party" to "State". Likewise, in various places, additional changes are appropriate so as to clarify that the offences in question are those referred to in draft article 5.

85. A few substantive changes are also necessary. First, as explained above, the first three paragraphs of article 44 of the United Nations Convention against Corruption on dual criminality are unnecessary and therefore need not be included in the proposed draft article 11.

86. Second, the political offence exception contained in article 44, paragraph 4, of the Convention should be broadened along the lines of article 13, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance, and should be placed in its own subparagraph in draft article 11 (see proposed draft article 11, paragraph 2, below).

87. Third, article 44, paragraph 6 (a), of the United Nations Convention against Corruption should be reformulated so that the default rule, if a State does not act, is that the State shall use the present draft articles as the legal basis for cooperation on extradition with other States. The State may avoid such an outcome if it so informs the Secretary-General of the United Nations at the time of deposit of its instrument of ratification, acceptance or approval of, or accession to the present draft articles (see proposed draft article 11, paragraph 4 (*a*), below).

88. Fourth, article 44 of the Convention does not contain a paragraph providing that, if necessary, the offences shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred, but also in the territory of the States that have established jurisdiction under proposed draft article 6. For reasons previously explained, such a paragraph should be added to draft article 11 (see proposed draft article 11, paragraph 8, below).

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[133] See the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 35 above).

89. Fifth, article 44, paragraph 10, of the United Nations Convention against Corruption overlaps with current draft article 8, paragraph 1, and therefore should not be included in draft article 11.

90. Sixth, article 44, paragraph 11, of the Convention is subsumed within current draft article 9, and therefore should not be included in draft article 11.

91. Seventh, article 44, paragraph 14, of the Convention overlaps with current draft article 10, and therefore should not be included in draft article 11.

92. Finally, article 44, paragraph 16, of the United Nations Convention against Corruption contains a provision that precludes a State party from refusing to extradite on the sole ground that the offence is also considered to involve fiscal matters, which is appropriate in the context of corruption (as well as transnational organized crime), where the offence may include issues such as evasion of taxes, customs or duties. However, such matters are not part of the offence of crimes against humanity, and therefore inclusion of such a provision does not appear warranted for a draft article on extradition.

93. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 11. Extradition

1. Each of the offences referred to in draft article 5 shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. For the purposes of extradition between States, an offence referred to in draft article 5 shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

3. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence referred to in draft article 5.

4. A State that makes extradition conditional on the existence of a treaty shall:

(*a*) use the present draft articles as the legal basis for cooperation on extradition with other States, unless it informs the Secretary-General of the United Nations to the contrary at the time of deposit of its instrument of ratification, acceptance or approval of, or accession to the present draft articles; and

(*b*) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States to the present draft articles in order to implement this draft article.

5. States that do not make extradition conditional on the existence of a treaty shall recognize offences to which this draft article applies as extraditable offences between themselves.

6. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State may refuse extradition.

7. States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence referred to in draft article 5.

8. If necessary, the offences set forth in draft article 5 shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 6, paragraph 1.

9. Whenever a State is permitted under its national law to extradite or otherwise surrender one of its nationals only upon condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State and the State seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in draft article 9.

10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

11. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any of these reasons.

12. Before refusing extradition, the requested State shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

13. States shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Chapter II

Non-refoulement

A. Principle of *non-refoulement*

94. The principle of *non-refoulement* obligates a State not to return an individual to another State when there are substantial grounds for believing that he or she will be in danger of persecution or other specified harm, such as torture or other cruel, inhuman or degrading treatment.[134] The principle was incorporated into treaties in the twentieth century, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV),[135] but is most commonly associated with international refugee law and, in particular, article 33 of the 1951 Convention relating to the Status of Refugees, which reads:

> Article 33. Prohibition of expulsion or return ("refoulement")
>
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[136]

95. Other conventions addressing refugees have incorporated the principle in similar terms to the Convention relating to the Status of Refugees, including the 1969 OAU [Organization of African Union] Convention governing the specific

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[134] See, generally, F. de Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture*, Leiden, Brill/Nijhoff, 2016.

[135] Article 45 reads, in relevant part: "In no circumstances shall a protected person be transferred to a country where he or she may have a reason to fear prosecution for his or her political opinions or religious beliefs." Recent International Committee of the Red Cross (ICRC) commentary on article 3 common to the four Geneva Conventions for the protection of war victims maintains that "[c]ommon Article 3 does not contain an explicit prohibition of *refoulement*. However, in the ICRC's view, the categorical prohibitions in common Article 3 would also prohibit a transfer of persons to places or authorities where there are substantial grounds for believing that they will be in danger of being subjected to violence to life and person, such as murder or torture and other forms of ill-treatment" (ICRC, Commentary of 2016, Article 3: Conflicts not of an international character, available from https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC, § 710).

[136] The same obligation applies under the 1967 Protocol relating to the Status of Refugees by virtue of article I, paragraph 1, of that Protocol. Unlike various other provisions in the Convention relating to the Status of Refugees, application of article 33 is not dependent on the lawful residence of a refugee in the territory of a contracting State. On whether article 33 governs a State Party's conduct even outside its territory, see Office of the United Nations High Commissioner for Refugees, *Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, Advisory opinion of 26 January 2007*, available from www.refworld.org/pdfid/45f17a1a4.pdf.

aspects of refugee problems in Africa,[137] as have some non-binding instruments.[138] The principle, as elucidated in the Convention relating to the Status of Refugees, has also been applied more broadly with respect to aliens (whether or not they are refugees),[139] such as in the 1969 American Convention on Human Rights: "Pact of San José, Costa Rica"[140] and the 1981 African Charter on Human and People's Rights,[141] and was addressed in the Commission's 2014 draft articles on the expulsion of aliens.[142]

96. The principle of *non-refoulement* is often reflected in general extradition treaties, by stating that nothing in the convention shall be interpreted as imposing an obligation to extradite an alleged offender if the requested State party has substantial grounds for believing that the request has been made for the purpose of persecuting the alleged offender on specified grounds. The proposed draft article 11, paragraph 11, discussed in the preceding chapter is a provision of this type.

97. The principle of *non-refoulement* is also incorporated in treaties addressing particular crimes, such as torture or enforced disappearance, which may be seen as an aspect of prevention of the crime. When this occurs, such treaties prohibit the return of *any* person — whether the person is an alleged offender or not, and whether or not the return is in the context of extradition — to another State when

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[137] Art. II, para. 3 ("No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2").

[138] See, for example, the 1984 Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984, available from www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf, conclusion 5 ("To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees …").

[139] See, for example, General Assembly resolution 2312 (XXII) of 14 December 1967; article III, paragraph 1, of the "Final Text of the AALCO's 1966 Bangkok Principles on the Status and Treatment of Refugees", adopted at the Asian–African Legal Consultative Organization's 40th session held in New Delhi on 24 June 2001, available from www.aalco.int/Final%20text%20of%20Bangkok%20Principles.pdf ("No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion"); and Council of Europe, Committee of Ministers, Recommendation No. R(84)1 on the Protection of persons satisfying the criteria in the Geneva Convention who are not formally recognised as refugees, adopted on 25 January 1984 ("the principle of non-refoulement has been recognised as a general principle applicable to all persons").

[140] Art. 22, para. 8 ("In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions").

[141] Art. 12, para. 3 ("Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions").

[142] *Yearbook … 2014*, vol. II (Part Two), art. 23, para. 1 ("No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law").

there are substantial grounds for believing that he or she will be in danger of being subjected to the crime that is the subject matter of the treaty. For example, article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads:

> 1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

98. Paragraph 1 captures the principle of *non-refoulement* in the context of the subject of the Convention (torture). This Convention modelled its language on the Convention relating to the Status of Refugees, but added the additional element of extradition so as to "cover all possible measures by which a person is physically transferred to another State".[143] A similar article is included in the Charter of Fundamental Rights of the European Union.[144]

99. The Human Rights Committee and the European Court of Human Rights have construed the prohibition against torture or cruel, inhuman or degrading treatment, contained in the 1966 International Covenant on Civil and Political Rights[145] and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), respectively,[146] as implicitly imposing an

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[143] D. Weissbrodt and I. Hörtreiter, "The principle of *non-refoulement*: article 3 of the Convention Against Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in comparison with the non-refoulement provisions of other international human rights treaties", *Buffalo Human Rights Law Review*, vol. 5 (1999), pp. 7–8.

[144] Art. 19, para. 2 ("No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"). See also Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *Official Journal of the European Union*, No. L 337, 20 December 2011, p. 9, articles 2, paragraph (f), and 15 (indicating that a person is entitled to protection from return when "substantial grounds have been shown for believing that the person concerned … would face a real risk of suffering serious harm", and "[s]erious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict").

[145] See the Human Rights Committee's general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-seventh session, Supplement No. 40* (A/47/40), paragraph 9 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement").

[146] *Chahal* v. *the United Kingdom, Application no. 22414/93, Judgment of 15 November 1996*, European Court of Human Rights, para. 80 ("whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 [the prohibition against torture and inhuman or degrading treatment] if removed to another State, the responsibility of the Contracting State to safeguard him or her against such

obligation of *non-refoulement* even though these conventions contain no such express obligation.

100. The standard to be applied when implementing such an obligation has been addressed by relevant committees and courts. The Committee Against Torture, in considering communications alleging that a State violated article 3, has stated that in determining whether there are "substantial grounds" for believing that a person would be in danger of being subjected to torture, it has to determine whether the return "would have the foreseeable consequence of exposing him to a real and personal risk of being arrested and tortured".[147] The Human Rights Committee similarly concluded that States must refrain from exposing individuals to a "real risk" of violations of their rights under the Covenant.[148] More recently, the Human Rights Committee has held that a State has an obligation "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant".[149] The European Court of Human Rights has also found that a State's responsibility exists where there are substantial grounds for believing that an individual would face a real risk of being subjected to treatment contrary to article 3.[150]

101. There is no precise definition of what constitutes a "real risk". The Committee Against Torture has stated that the risk must be assessed on grounds that "go beyond mere theory or suspicion", though "the risk does not have to meet the test of being highly probable".[151] The European Court of Human Rights has also confirmed that a real risk is something more than a mere possibility but something less than more likely than not.[152]

102. The European Court of Human Rights has stressed that the examination of evidence of a real risk must be "rigorous".[153] In determining whether substantial

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treatment is engaged in the event of expulsion").

[147] *Aemei* v. *Switzerland*, Communication No. 34/1995, Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-second session, Supplement No. 44* (A/52/44), Annex V.B.2, para. 9.5. See also *A. R. J.* v. *Australia*, Communication No. 692/1996, Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-second session, Supplement No. 40* (A/52/40), Annex VI.T, paragraph 6.14 (finding that the risk of torture must be "the necessary and foreseeable consequence of deportation").

[148] *Chitat Ng* v. *Canada*, Communication No. 469/1991, Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-ninth session, Supplement No. 40* (A/49/40), Annex IX.CC, para. 14.1.

[149] See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, Report of the Human Rights Committee, vol. I, *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 40* (A/59/40), Annex III, paragraph 12.

[150] See *Soering* v. *the United Kingdom, Application no. 14038/88, Judgement of 7 July 1989*, European Court of Human Rights, *Judgments and Decisions: Series A*, vol. 161, paragraph 88; and *Chahal* v. *the United Kingdom* (footnote 146 above), paragraph 74.

[151] General comment No. 1 (1997) on the implementation of article 3, Report of the Committee Against Torture, *Official Records of the General Assembly, Fifty-third session, Supplement No. 44* (A/53/44), Annex IX, para. 6.

[152] *Saadi* v. *Italy, Application no. 37201/06, Judgment of 28 February 2008*, European Court of Human Rights, *Reports of Judgments and Decisions 2008*, paras. 131 and 140.

[153] *Ibid.*, para. 128.

grounds have been shown for believing that a real risk of treatment contrary to article 3 exists, the evidence of the risk "must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion",[154] though regard can be had to information that comes to light subsequently.[155] Adopting the same approach, the Human Rights Committee has further affirmed that there does not need to be "proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk".[156] In determining the risk of such treatment, all relevant factors should be considered and "[t]he existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed".[157] The Committee Against Torture has a non-exhaustive list of seven elements to be considered by a State when determining if return is permissible.[158]

103. Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance uses virtually the same language as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but replaces "torture" with "enforced disappearance", adds the terms "or she" and "surrender", and adds at the end "or of serious violations of international humanitarian law". It reads:

> 1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.[159]

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[154] *Ibid.*, para. 133.

[155] *El-Masri* v. *the former Yugoslav Republic of Macedonia, Application no. 39630/09, Judgment of 13 December 2012*, European Court of Human Rights, *Reports of Judgments and Decisions 2012*, para. 214.

[156] *Maksudov and others* v. *Kyrgyzstan*, Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, Report of the Human Rights Committee, vol. II, *Official Records of the General Assembly, Sixty-third session, Supplement No. 40* (A/63/40), Annex V.W, para. 12.4.

[157] *Ibid.*

[158] General comment No. 1 (see footnote 151 above), para. 8. The list contains the following elements: (*a*) where the State concerned is one for which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights; (*b*) whether the individual has been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past; (*c*) whether there is medical or other independent evidence to support a claim that the individual has been tortured or maltreated in the past; (*d*) whether the internal situation with respect to human rights in the State concerned has changed; (*e*) whether the individual has engaged in political or other activity within or outside the State concerned which would make him particularly vulnerable to the risk of being placed in danger of torture; (*f*) whether there is any evidence as to the credibility of the individual; and (*g*) whether there are any factual inconsistencies in the individual's claim.

[159] For an analysis, see S. McCrory, "The International Convention for the Protection of All Persons from Enforced Disappearance", *Human Rights Law Review*, vol. 7, No. 3 (2007), pp. 554–555.

104. During the drafting of the International Convention for the Protection of All Persons from Enforced Disappearance, some delegations considered that paragraph 1 could be written more broadly to address return when there was a danger of any serious human rights violation. Yet most "delegations considered that the obligation not to return a person ... should apply only in cases where a risk of enforced disappearance existed rather than a risk of serious human rights violations, which was too broad a formula".[160] Consequently, the Convention only seeks to address *non-refoulement* of persons when they face the risk of enforced disappearance; the risk that they will face other human rights violations is left to be regulated by other treaties and customary international law.

105. The Convention relating to the Status of Refugees contains exceptions to the *non-refoulement* obligation so as to allow return where the person had committed a crime or presented a serious security risk. Treaties since that time, however, have not included such exceptions, treating the obligation as absolute in nature.[161] Indeed, the *non-refoulement* obligation is viewed as non-derogable.[162]

B. Draft article 12. *Non-refoulement*

106. In light of the above, a draft article on *non-refoulement* appears warranted for the present draft articles, which could be based on the text contained in the International Convention for the Protection of All Persons from Enforced Disappearance quoted in paragraph 103 above. Paragraph 1 would focus on stating the principle of *non-refoulement* in the context of a danger of being subjected to a crime against humanity. Notably, use of the phrase "to another State" would not limit the provision to situations where an official of a foreign Government may commit the crime against humanity; rather, the danger may alternatively exist with respect to non-State actors in the other State. Paragraph 2 would instruct States parties to look at all relevant considerations, while indicating, on a non-exclusive basis, particular considerations of relevance.

107. The following draft article is proposed:

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[160] Commission on Human Rights, Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71), para. 49.

[161] See, for example, *Maksudov and others* v. *Kyrgyzstan* (footnote 156 above), paragraph 12.4 (finding that the prohibition on return in the International Covenant on Civil and Political Rights "should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of"). See also *Othman (Abu Qatada)* v. *the United Kingdom, Application No. 8139/09, Judgment of 17 January 2012*, European Court of Human Rights, *Reports of Judgments and Decisions 2012*, paragraph 185; and *Gorki Ernesto Tapia Paez* v. *Sweden*, Communication No. 39/1996, Report of the Committee Against Torture, *Official Records of the General Assembly, Fifty-second session, Supplement No. 44* (A/52/44), Annex V, paragraph 14.5.

[162] Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-seventh session, *Official Records of the General Assembly, Fifty-first session, Supplement No. 12* (A/51/12/Add.1), para. 21 (i) ("recalls that the principle of non-refoulement is not subject to derogation"); and General Assembly resolution 51/75 of 12 February 1997, para. 3 ("calls upon all States ... to respect scrupulously the fundamental principle of non-refoulement, which is not subject to derogation").

Draft article 12. *Non-refoulement*

1. No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Chapter III
Mutual legal assistance

108. Following the occurrence of a crime against humanity, a State conducting an investigation or prosecution in relation to the offences referred to in draft article 5 may wish to seek assistance from another State in gathering information and evidence, including through documents, sworn declarations and oral testimony by victims or witnesses. Cooperation on such matters, which is typically undertaken on a basis of reciprocity, is referred to as "mutual legal assistance".[163]

109. At present, there is no global or regional treaty addressing mutual legal assistance specifically in the context of crimes against humanity. Rather, to the extent that cooperation of this kind occurs with respect to crimes against humanity, it takes place through voluntary cooperation by States as a matter of comity or, if they exist, bilateral or multilateral treaties addressing mutual legal assistance with respect to crimes generally (referred to as mutual legal assistance treaties). Having a legal obligation to provide such assistance is considered preferable, as it provides a more predictable framework for cooperation and a structure for clarifying the mode of cooperation.[164]

110. While there are examples of multilateral mutual legal assistance treaties at the regional level,[165] there is no global mutual legal assistance treaty, and most cooperation takes place pursuant to agreements concluded by States on a bilateral basis.[166] It is common for multilateral mutual legal assistance treaties to give deference to any existing bilateral agreement between the two States concerned, because such an agreement is likely to be more detailed and calibrated to take account of any peculiarities of the States' national legal systems.[167]

111. Provisions contained in bilateral mutual legal assistance treaties tend to be similar, in part due to the approach by States of using the formula contained in previously concluded bilateral agreements and in part due to the influence of "model" treaties or national laws.[168] Notably, in 1990, the General Assembly adopted a Model Treaty on Mutual Assistance in Criminal Matters and Optional Protocol to the Model Treaty on Mutual Assistance in Criminal Matters concerning

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[163] See generally M. C. Bassiouni, *Introduction to International Criminal Law*, 2nd rev. ed., Leiden, Martinus Nijhoff, 2013, pp. 504–506; T. R. Salomon, "Mutual legal assistance in criminal matters", in *Max Planck Encyclopedia of Public International Law* (January 2013); and J. van der Sanden and W. J. van der Wolf (eds.), *Mutual Legal Assistance in International Criminal Matters*, Nijmegen, Wolf Legal Publishers, 2012.

[164] Bassiouni, *Introduction to International Criminal Law* (footnote above), pp. 504–506.

[165] See, for example, the 1959 European Convention on Mutual Assistance in Criminal Matters; the 1992 Inter-American Convention on Mutual Assistance in Criminal Matters; the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (supplement to the 1959 European Convention on Mutual Assistance in Criminal Matters and the 1978 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters); and the [ASEAN] Treaty on Mutual Legal Assistance in Criminal Matters.

[166] For a map displaying existing bilateral mutual legal assistance treaties between States, see Access Now, "Mutual legal assistance treaties", available from https://mlat.info.

[167] See Olson (footnote 68 above), p. 338.

[168] Bassiouni, *Introduction to International Criminal Law* (footnote 163 above), p. 506.

the proceeds of crime,[169] characterizing it "as a useful framework that could be of assistance to States interested in negotiating and concluding bilateral agreements aimed at improving co-operation in matters of crime prevention and criminal justice".[170] In 2007, the UNODC also established a Model Law on Mutual Assistance in Criminal Matters, which could be adopted by States at the national level.[171]

112. While mutual legal assistance relating to crimes against humanity can occur through existing multilateral and bilateral mutual legal assistance treaties, in many instances there is no such treaty between the requesting and requested States.[172] As is the case for extradition (discussed above in chapter I), a State often has no treaty relationship with a large number of other States on mutual legal assistance, so that when cooperation is needed with respect to a crime against humanity there is no international legal instrument in place to address the matter.

113. The absence of multilateral legal obligations for mutual legal assistance with respect to crimes against humanity has resulted in calls for a provision on mutual legal assistance to be added to a new global convention on crimes against humanity.[173] During the Sixth Committee debates in 2015 and 2016, States expressed the view that provisions on mutual legal assistance for crimes against humanity at the international level were lacking and should be included in the present topic.[174]

114. In developing such a draft article, guidance may be found in existing treaties that address a specific type of crime, such as torture or corruption. Generally speaking, such treaties either contain a less detailed "short-form" article or a more detailed "long-form" article on mutual legal assistance. Both forms establish the core obligation to cooperate, but the latter provides much greater detail as to how such cooperation is to operate. Indeed, the long-form article contains what might be

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[169] Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990, Annex.

[170] *Ibid.*, para. 1. See also UNODC, Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, Part One: Revised Manual on the Model Treaty on Mutual Assistance in Criminal Matters, p. 65, available from www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf.

[171] See UNODC, Model Law on Mutual Assistance in Criminal Matters, available from www.unodc.org/pdf/legal_advisory/Model%20Law%20on%20MLA%202007.pdf.

[172] See the Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998, done at Vienna on 20 December 1988 (E/CN.7/590), pp. 184–185, para. 7.22 (finding that "[t]here are still … many States that are not parties to general mutual legal assistance treaties and many circumstances in which no bilateral treaty governs the relationship between the pair of States concerned in a particular matter"). See also Olson (footnote 68 above), p. 336.

[173] *Ibid.*

[174] See, for example, Switzerland, *Official Records of the General Assembly, Seventieth session, Sixth Committee, 22nd meeting* (A/C.6/70/SR.22), paragraph 20 ("Key elements that future draft articles should address included provisions on mutual legal assistance requiring States to cooperate while respecting existing constraints in national systems"); and the Netherlands, *Official Records of the General Assembly, Seventy-first session, Sixth Committee, 26th meeting* (A/C.6/71/SR.26), paragraph 40 ("Another matter of concern to her delegation was that a convention on the prohibition of crimes against humanity should include provisions on mutual legal cooperation and assistance between States").

referred to as a "mini mutual legal assistance treaty", setting forth the key provisions for mutual legal assistance which are to be used if the two States concerned have no other multilateral or bilateral mutual legal assistance treaty in force between them.

A. Short-form mutual legal assistance article

115. The short-form mutual legal assistance article contained in some treaties addressing crimes at the national level is brief. Such an article focuses on requiring the greatest measure of cooperation between States, while not providing any details as to how such cooperation should operate, and calls for the application of any existing mutual legal assistance treaties between the States concerned. For example, article 9 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides:

> 1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
>
> 2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

116. Similarly, article 10 of the International Convention for the Suppression of Terrorist Bombings provides:

> 1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings.
>
> 2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

117. The most recent example of this type of provision is found in article 14 of the International Convention for the Protection of All Persons from Enforced Disappearance, which states:

> 1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.
>
> 2. Such mutual legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular, the conditions in relation to

> the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.[175]

118. Treaties with similar short-form articles include: the Convention for the suppression of unlawful seizure of aircraft (art. 10); the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 10);[176] the 1996 Inter-American Convention against Corruption (art. XIV); the 2002 Inter-American Convention against Terrorism (art. 9); and the 2003 African Union Convention on Preventing and Combating Corruption (art. 18).

B. Long-form mutual legal assistance article

119. While a short-form article for mutual legal assistance appears in several conventions, States have also been attracted to a long-form article for mutual legal assistance, which contains much more detail as to how such assistance should operate.

120. Several global treaties contain such a long-form article, including: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 7); the International Convention for the Suppression of the

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[175] The first version of this article appeared in the 1998 draft at article 8, and read as follows: "1. States Parties shall afford one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings relating to the offence of forced disappearance, including the supply of all the evidence at their disposal that is necessary for the proceedings. 2. States Parties shall cooperate with each other, and shall afford one another the greatest measure of legal assistance in the search for, location, release and rescue of disappeared persons or, in the event of death, in the return of their remains. 3. States Parties shall carry out their obligations under paragraphs 1 and 2 of this article, without prejudice to the obligations arising from any treaties on mutual legal assistance that may exist between them" (Commission on Human Rights, Report of the sessional working group on the administration of justice, (E/CN.4/Sub.2/1998/19, Annex), p. 25). A number of delegations supported the deletion of paragraph 3 of draft article 8, which was considered vague and duplicative of language in paragraph 2 (see the Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (footnote 44 above), p. 19 (paragraph 3 dealt with "refusal to provide legal assistance on grounds related to sovereignty, security, public order or other essential interests of the requested State")). The phrase "judicial assistance" was replaced with "legal assistance" to accord with evolving usage (Commission on Human Rights, Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2005/66), para. 69; see also the Revised Manual on the Model Treaty on Mutual Assistance in Criminal Matters (footnote 170 above), paragraphs 6–7 (discussing the use of "mutual assistance" instead of "judicial assistance" to avoid problems resulting from differences in legal systems)).

[176] Article 10 of this convention was substantially based, with some modification, on article 10 of the Convention for the suppression of unlawful seizure of aircraft. See *Yearbook ... 1972*, vol. II, p. 321, paragraph (2) of the commentary to article 10 ("Article 10 substantially reproduces the provisions of article 10 of The Hague Convention ... the phrase 'including the supply of all evidence at their disposal necessary for the proceedings' has been added in order to ensure that the article is not given a limited construction on the basis of the narrow technical meaning sometimes attributed to the expression 'mutual judicial assistance'").

Financing of Terrorism;[177] the United Nations Convention against Transnational Organized Crime (art. 18); and the United Nations Convention against Corruption (art. 46).

121. The move towards use of the long-form article is apparent from the drafting history of the United Nations Convention against Transnational Organized Crime. Initially, the article on mutual legal assistance was a two-paragraph provision similar to a short-form article.[178] States decided early on, however, that this short-form article should be replaced with a much more detailed article based on article 7 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[179] The drafters of the United Nations Convention against Corruption similarly opted to use a detailed provision and reproduced, nearly in its entirety, article 18 of the United Nations Convention against Transnational Organized Crime. Article 46 of the United Nations Convention against Corruption, on mutual legal assistance, consists of 30 paragraphs and reads as follows:

> 1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.
>
> 2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.
>
> 3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
>
> (a) Taking evidence or statements from persons;
>
> (b) Effecting service of judicial documents;
>
> (c) Executing searches and seizures, and freezing;
>
> (d) Examining objects and sites;
>
> (e) Providing information, evidentiary items and expert evaluations;
>
> (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

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[177] Art. 7, para. 5, and arts. 12–16. The mutual legal assistance provisions in the International Convention for the Suppression of the Financing of Terrorism are scattered among several articles and mutual legal assistance is addressed in several provisions which concern both mutual assistance and extradition. The trend in more recent conventions, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, is to consolidate mutual legal assistance provisions into a single article (see articles 18 and 46, respectively).

[178] See Commission on Crime Prevention and Criminal Justice, Question of the elaboration of an international convention against transnational organized crime (E/CN.15/1997/7/Add.1), p. 15; and McClean (footnote 81 above), p. 201.

[179] See Question of the elaboration of an international convention against transnational organized crime (footnote above), p. 15 (suggestions of Australia and Austria).

(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) Facilitating the voluntary appearance of persons in the requesting State Party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests

received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by videoconference if it is not possible or desirable for the

individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

> 25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.
>
> 26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.
>
> 27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.
>
> 28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.
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> 29. The requested State Party:
>
> (a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;
>
> (b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.
>
> 30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

122. Such a long-form article would appear best suited for draft articles on crimes against humanity, for several reasons. First, it provides much more guidance to States with respect to mutual legal assistance and allows them to rely upon the provisions of the article in the absence of any mutual legal assistance treaty between the States concerned. Second, long-form articles have been viewed by States as necessary in the context of crime prevention and punishment in important areas of

transnational criminal law.[180] Third, long-form articles have been accepted in practice by States. For example, the United Nations Convention against Transnational Organized Crime has 187 States parties and the United Nations Convention against Corruption has 181 States parties. No State party has filed a reservation objecting to the language or content of the mutual legal assistance article in either convention.[181] Additionally, the provisions of long-form mutual legal assistance treaty articles are well understood by States with the aid of numerous guides and other resources, such as those by UNODC, that have been developed to aid in the implementation of the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption.[182]

123. To that end, the draft article proposed at the conclusion of this chapter is largely modelled on article 46 of the United Nations Convention against Corruption, with some changes as noted below. The following subsections discuss the provisions of article 46 of that Convention, grouped into three categories: (1) the general obligation to afford mutual legal assistance; (2) cooperation when a mutual legal assistance treaty exists between the two States concerned; and (3) cooperation when a mutual legal assistance treaty does not exist between the two States concerned.

1. General obligation to afford mutual legal assistance

124. Article 46, paragraph 1, of the United Nations Convention against Corruption establishes a general obligation for States parties to "afford one another the widest

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[180] The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was negotiated within the Commission on Narcotic Drugs at the request of the General Assembly and the Economic and Social Council. The International Convention for the Suppression of the Financing of Terrorism was developed by an *ad hoc* committee established by the General Assembly pursuant to its resolutions 53/108 of 8 December 1998 and 51/210 of 17 December 1996. The United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption were negotiated within the Commission on Crime Prevention and Criminal Justice, which was established by the Economic and Social Council in its resolution 1992/1 of 6 February 1992 according to the request of the General Assembly in its resolution 46/152 of 18 December 1991, as one of its functional commissions. This Commission acts as the principal policymaking body of the United Nations in the field of crime prevention and criminal justice.

[181] States parties to the United Nations Convention against Transnational Organized Crime made declarations to article 18, paragraphs 13 and 14, to notify the Secretary-General of the designated central authority and the preferred language of requests. States similarly made declarations to the United Nations Convention against Corruption, as required under article 46, paragraphs 13 and 14.

[182] See, for example, the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (footnote 35 above); the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (*ibid.*); the *Technical Guide to the United Nations Convention against Corruption* (*ibid.*); the Travaux Préparatoires *of the Negotiation for the Elaboration of the United Nations Convention against Corruption* (*ibid.*); and the Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (*ibid.*).

measure of mutual legal assistance"[183] with respect to offences arising under that Convention. States parties are obligated to afford each other such assistance not just in "investigations" but also in "prosecutions" and "judicial proceedings". Such an obligation is intended to ensure that the broader enforcement goal of the treaty is furthered by comprehensive cooperation among all States parties that might possess relevant information and evidence with respect to the offence.[184] Paragraph 1 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 1, below).

125. Article 46, paragraph 2, of the United Nations Convention against Corruption establishes a general obligation upon States parties also to afford such cooperation with respect to offences for which a "legal person" may be held liable, but only "to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party".[185] This qualification is a recognition that national legal systems differ considerably in their treatment of legal persons in relation to crimes, and therefore mutual legal assistance in this context must be contingent on the extent to which such cooperation is possible under the requested State party's national law in a criminal case.[186] Paragraph 2 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 2, below).

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[183] See also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 9, paragraph 1 ("States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings"); the International Convention for the Suppression of the Financing of Terrorism, article 12, paragraph 1 ("States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings"); and the United Nations Convention against Transnational Organized Crime, article 18, paragraph 1 ("States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention").

[184] *Yearbook ... 1972*, vol. II, p. 321, paragraph (2) of the commentary to article 10 ("Clearly if the alleged offender is to be tried in a State other than that in which the crime was committed it will be necessary to make testimony available to the court hearing the case and in such form as the law of that State requires. In addition, part of the required evidence may be located in third States. Consequently the obligation is imposed upon all States party").

[185] See also the United Nations Convention against Transnational Organized Crime, article 18, paragraph 2 (identical language). During the drafting of that Convention, there was general support for the inclusion of a provision on mutual legal assistance concerning legal persons, even though some delegations considered that the matter was already covered under paragraph 1. See McClean (footnote 81 above), pp. 207–208. By contrast, the International Convention for the Suppression of the Financing of Terrorism does not obligate States to afford assistance in cases involving legal persons, but does provide in article 12, paragraph 4 that "[e]ach State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5 [on liability of legal persons]".

[186] In this regard, reference might be made to the differences in national legal systems identified with respect to draft article 5, paragraph 7.

126. Article 46, paragraph 3, of the United Nations Convention against Corruption lists several broad types of assistance that may be requested by a State party.[187] These types of assistance are drafted in broad terms and, in most respects, replicate types of assistance listed in other multilateral[188] and many bilateral[189] extradition treaties. Indeed, such terms are broad enough to encompass the range of assistance that might be relevant for the investigation and prosecution of a crime against humanity, including the seeking of police and security agency records; court files;

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[187] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 7, paragraphs 2–3 (containing substantially similar language to the United Nations Convention against Corruption); the United Nations Convention against Transnational Organized Crime, article 18, paragraph 3 (identical language); and the Model Treaty on Mutual Assistance in Criminal Matters (footnote 169 above), article 1, paragraph 2 (substantially similar language to the United Nations Convention against Corruption). For discussion, see McClean (footnote 81 above), pp. 208–212; and the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (footnote 35 above), paragraph 475 ("Generally, mutual legal assistance treaties provide for such forms of cooperation [as are included in article 18, paragraph 3]").

[188] See, for example, the Inter-American Convention on Mutual Assistance in Criminal Matters, article 7 ("The assistance envisaged under this convention shall include the following Procedures among others: a. notification of rulings and judgments; b. taking of testimony or statements from persons; c. summoning of witnesses and expert witnesses to provide testimony; d. immobilization and sequestration of property, freezing of assets, and assistance in procedures related to seizures; e. searches or seizures; f. examination of objects and places; g. service of judicial documents; h. transmittal of documents, reports, information, and evidence; i. transfer of detained persons for the purpose of this convention; and j. any other procedure provided there is an agreement between the requesting state and the requested state"); and the [ASEAN] Treaty on Mutual Legal Assistance in Criminal Matters, article 1, paragraph 2 ("Mutual assistance to be rendered in accordance with this Treaty may include: (a) taking of evidence or obtaining voluntary statements from persons; (b) making arrangements for persons to give evidence or to assist in criminal matters; (c) effecting service of judicial documents; (d) executing searches and seizures; (e) examining objects and sites; (f) providing original or certified copies of relevant documents, records and items of evidence; (g) identifying or tracing property derived from the commission of an offence and instrumentalities of crime; (h) the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated; (i) the recovery, forfeiture or confiscation of property derived from the commission of an offence; (j) locating and identifying witnesses and suspects; and (k) the provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party").

[189] See, for example, the Model Treaty on Mutual Assistance in Criminal Matters (footnote 169 above), article 1, paragraph 2 ("Mutual assistance to be afforded in accordance with the present Treaty may include: (a) Taking evidence or statements from persons; (b) Assisting in the availability of detained persons or others to give evidence or assist in investigations; (c) Effecting service of judicial documents; (d) Executing searches and seizures; (e) Examining objects and sites; (f) Providing information and evidentiary items; (g) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records"); the Treaty on Mutual Legal Assistance between the United States of America and the Russian Federation, done at Moscow on 17 June 1999, available from www.state.gov/documents/organization/123676.pdf, article 2 ("Legal assistance under this Treaty shall include: (1) obtaining testimony and statements; (2) providing documents, records, and other items; (3) serving documents; (4) locating and identifying persons and items; (5) executing requests for searches and seizures; (6) transferring persons in custody for testimony or other purposes under this Treaty; (7) locating and immobilizing assets for purposes of forfeiture, restitution, or collection of fines; and (8) providing any other legal assistance not prohibited by the laws of the Requested Party").

citizenship, immigration, birth, marriage, and death records; health records; forensic material; and biometric data. Further, the list is not exhaustive, as it provides in subparagraph (i) a catch-all provision relating to "[a]ny other type of assistance that is not contrary to the domestic law of the requested State Party". Any existing bilateral mutual legal assistance treaty between States parties that lack the forms of cooperation listed in article 46, paragraph 3, are generally considered "as being automatically supplemented by those forms of cooperation".[190] In light of the above, paragraph 3 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 3, below).

127. Article 46, paragraph 4, of the United Nations Convention against Corruption encourages each State party to transmit information to another State party, even in the absence of a request, if doing so could assist the latter in undertaking or successfully concluding inquiries and criminal proceedings, or could result in a request from the latter for mutual legal assistance.[191] Such a provision was viewed as innovative when first used in the United Nations Convention against Transnational Organized Crime, though it "declares what must always have been the case, that the authorities of one State may take the initiative in providing information to another".[192] At the same time, this provision is stated in discretionary terms, providing that a State party "may" transmit information, and is further conditioned by the clause "[w]ithout prejudice to domestic law", making clear that States parties are not obliged to transmit information. Paragraph 4 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 6, below).

128. Article 46, paragraph 5, of the United Nations Convention against Corruption relates to paragraph 4 by addressing a situation where the State party providing the information requires that the information be kept confidential or otherwise restricts its use. Such restrictions are to be honoured, unless disclosure to the alleged offender is necessary because the information is exculpatory.[193] The drafters of the United Nations Convention against Transnational Organized Crime decided to include an "interpretative note" in the *travaux préparatoires* on this issue so as to provide further guidance:

> The *travaux préparatoires* should indicate that (a) when a State Party is considering whether to spontaneously provide information of a particularly sensitive nature or is considering placing strict restrictions on the use of information thus provided, it is considered advisable for the State Party concerned to consult with the potential receiving State beforehand; (b) when a State Party that receives information under this provision already has similar

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[190] *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 35 above), p. 170, para. 605 (advising also that under some national legal systems, amending legislation may be required to incorporate additional bases of cooperation).

[191] See also the United Nations Convention against Transnational Organized Crime, article 18, paragraph 4 (identical language); and the *Technical Guide to the United Nations Convention against Corruption* (footnote 35 above), p. 165 ("The aim of these provisions is to encourage States Parties to exchange information on criminal matters voluntarily and proactively").

[192] McClean (footnote 81 above), p. 212.

[193] See also the United Nations Convention against Transnational Organized Crime, article 18, paragraph 5 (identical language); and McClean (footnote 81 above), p. 213.

> information in its possession, it is not obliged to comply with any restrictions imposed by the transmitting State.[194]

Paragraph 5 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 7, below).

129. Article 46, paragraph 8, of the United Nations Convention against Corruption provides that "States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy". The *Legislative Guide* to the Convention states:

> It is significant that this paragraph is not included among the paragraphs that only apply in the absence of a mutual legal assistance treaty. Instead, States parties are obliged to ensure that no such ground for refusal may be invoked under their mutual legal assistance laws or treaties. ... Thus, where a State party's laws currently permit such ground for refusal, amending legislation will be required. Where such a ground for refusal is included in any State party's mutual legal assistance treaties, the act of that State becoming party to the Convention against Corruption should as a matter of treaty law automatically invalidate the contrary provisions of an earlier treaty. Should a State party's legal system provide that treaties are not applied directly, domestic legislation may be required.[195]

Similar language appears in other multilateral and bilateral treaties on mutual legal assistance.[196] Arguably such a provision, however, is not needed for the present draft articles, given that the offences at issue are not financial in nature. Yet given that a crime against humanity might entail a situation where assets have been stolen in the course of the crime, and where mutual legal assistance regarding those assets might be valuable for proving the crime, such a provision may have some value even in this context. As such, paragraph 8 appears to provide a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 4, below).

130. Finally, article 46, paragraph 30, of the United Nations Convention against Corruption calls upon States parties to consider "the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes

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[194] Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (see footnote 35 above), para. 37.

[195] *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 35 above), p. 171, paras. 611–612.

[196] See the United Nations Convention against Transnational Organized Crime, article 18, paragraph 8 ("States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy"); the International Convention for the Suppression of the Financing of Terrorism, article12, paragraph 2 ("States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy"); the Model Treaty on Mutual Assistance in Criminal Matters (footnote 169 above), article 4, paragraph 2 ("Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions"); and the [ASEAN] Treaty on Mutual Legal Assistance in Criminal Matters, article 3, paragraph 5 ("Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters"). For discussion, see McClean (footnote 81 above), pp. 215–216.

of, give practical effect to or enhance the provisions of this article".[197] Paragraph 30 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 5, below).

2. Cooperation when a mutual legal assistance treaty exists between the States concerned

131. Article 46, paragraph 6, of the United Nations Convention against Corruption makes clear that "[t]he provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance". In other words, any other mutual legal assistance treaty in place between the two States parties, whether concluded before or after entry into force of the Convention for those parties, continues to apply.[198] Identical wording is found in article 18, paragraph 6, of the United Nations Convention against Transnational Organized Crime and substantially identical wording is found in article 7, paragraph 6, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[199]

132. While this provision preserves obligations under existing mutual legal assistance treaties, it does not automatically give those treaties priority over the provisions contained in the United Nations Convention against Corruption.[200] Rather, the provision is interpreted as requiring States parties to satisfy the highest level of assistance to which they have agreed, whether found in the Convention or in another bilateral or multilateral mutual legal assistance treaty.[201] The commentary to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances makes this clear:

> Paragraph 6 embodies an important provision dealing with potential conflict with existing or future mutual legal assistance treaties. It does not give those treaties a general priority over the provisions of the 1988 Convention. Its effect, instead, is to preserve the obligations incurred under general mutual legal assistance treaties from any diminution as a result of the specific provisions of the Convention. This means that where the Convention requires the provision of a higher level of assistance in the context of illicit trafficking than is provided for under the terms of an applicable bilateral or multilateral mutual legal assistance treaty, the provisions of the Convention will prevail. In

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[197] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 7, paragraph 20 (identical language); and the United Nations Convention against Transnational Organized Crime, art. 18, para. 30 (identical language). For discussion, see the Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (footnote 172 above), p. 199, paragraph 7.59.

[198] *Yearbook ... 1972*, vol. II, p. 321, paragraph (1) of the commentary to article 10 (regarding a similar provision in draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons: "Mutual assistance in judicial matters has been a question of constant concern to States and is the subject of numerous bilateral and multilateral treaties. The obligations arising out of any such treaties existing between States party to the present draft are fully preserved under this article").

[199] Art. 7, para. 6 ("The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance in criminal matters").

[200] See McClean (footnote 81 above), p. 214.

[201] *Ibid.*

> the converse case, where the treaty provides for a higher level of assistance, this paragraph comes into play and the treaty provisions will prevail with respect to the extent of the requested party's obligations.[202]

133. At the same time, article 46, paragraph 7, of the United Nations Convention against Corruption provides that paragraphs 9 to 29 of article 46 do *not* apply in the event that there exists a mutual legal assistance treaty between the States parties concerned.[203] Rather, the corresponding provisions of that treaty alone apply, leaving only paragraphs 1 to 8 and 30 of the Convention to apply as between the States parties concerned.

134. Even so, paragraph 7 indicates that, in such a situation, States parties "are strongly encouraged to apply paragraphs 9 to 29 if they facilitate cooperation". The United Nations Convention against Transnational Organized Crime uses identical language in article 18, paragraph 7, and similar language is used in article 7, paragraph 7, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[204] The Commentary to the latter Convention states:

> Where there is no applicable mutual legal assistance treaty, the Convention supplies the necessary provisions in paragraphs 8-19. Where there is an applicable treaty, its provisions will be followed in place of those set out in paragraphs 8-19; this enables pairs of States to follow the procedures with which they have become familiar in the general context of mutual legal assistance ... . Parties to a general mutual legal assistance treaty concerned in a particular matter may, however, choose to agree that the provisions of the Convention should apply in that context.[205]

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[202] Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see footnote 172 above), p. 184, para. 7.20.

[203] Whether the other instrument must be a treaty or can be some other form of arrangement is disputed. Compare the Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (*ibid.*), p. 185, para. 7.24 ("There are a number of parties whose general mutual legal assistance practice is governed by some instrument, such as the Commonwealth Scheme, which lacks the formality of a full treaty. The text of paragraph 7 uses the term 'a treaty of mutual legal assistance', and that has become a term of art. It does not appear to include the less formal agreements or arrangements, where the provisions of paragraphs 8–19 will apply for all cases falling within the scope of the Convention, unless the parties agree otherwise"), with McClean (see footnote 81 above), p. 215 (maintaining that it has been assumed the reference to "a treaty of mutual legal assistance" in article 7, paragraph 7, of the United Nations Convention against Transnational Organized Crime encompasses multilateral conventions and "it would be unfortunate if it did not also cover certain arrangements such as the Commonwealth Scheme which are not technically 'treaties'" in addition to bilateral mutual legal assistance treaties).

[204] Art. 7, para. 7 ("Paragraphs 8 to 19 of this article shall apply to requests made pursuant to this article if the Parties in question are not bound by a treaty of mutual legal assistance. If these Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 8 to 19 of this article in lieu thereof").

[205] Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see footnote 172 above), p. 185, para. 7.23. See also the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 35 above), p. 171, paragraph 608 ("If a treaty is in force between the States parties concerned, the rules of the treaty will apply instead, unless the States agree to apply paragraphs 9 to 29 of article 46 of the Convention"); and McClean (footnote 81 above), p. 215 (discussing article 18,

135. The result of article 46, paragraphs 6 and 7, of the United Nations Convention against Corruption is that there are some provisions applicable to all States parties (paragraphs 1 to 8 and 30) and there are some provisions (the "mini mutual legal assistance treaty" provisions in paragraphs 9 to 29) that apply among States parties unless there is a bilateral or multilateral mutual legal assistance treaty between the States parties concerned[206] (even then, those States parties are encouraged to use some or all of the "mini mutual legal assistance treaty" provisions to better facilitate cooperation). Paragraphs 6 and 7 provide a suitable basis for two paragraphs within a draft article on mutual legal assistance (see proposed draft article 13, paragraphs 8 and 9, below).

3. Cooperation when a mutual legal assistance treaty does not exist between the States concerned

136. As set out above, article 46, paragraph 7, of the United Nations Convention against Corruption provides that when there is no mutual legal assistance treaty in place between the States parties concerned, the "mini mutual legal assistance treaty" provisions of paragraphs 9 to 29 apply.

137. Article 46, paragraph 9, of the Convention addresses the issue of a request for mutual legal assistance in the absence of dual criminality.[207] As noted above in the section on dual criminality, the present draft articles on crimes against humanity are designed to ensure the existence of dual criminality in the requesting and requested States, such that paragraph 9 does not appear necessary or indeed appropriate for the present draft articles.

138. Article 46, paragraphs 10 to 12, of the United Nations Convention against Corruption addresses the situation where a person being detained or serving a sentence in one State party is needed in another State party for purposes of identification, testimony or other assistance. As a general matter, these provisions set forth the basic conditions under which such a person might be transferred to the other State party for these purposes and then returned.[208] Paragraphs 10 to 12

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paragraph 7, of the United Nations Convention against Transnational Organized Crime, and noting that "where there is an applicable multilateral convention or a bilateral [mutual legal assistance treaty], its provisions will be followed in place of those set out in paragraphs 9 to 29" and that supplanting provisions "negotiated with close regard to the principles of the national legal systems of the two States involved . . . would have created serious difficulties in determining, in particular cases, which set of rules was to be followed").

[206] McClean (footnote 81 above), p. 215 (discussing article 18, paragraph 7, of the United Nations Convention against Transnational Organized Crime: "Particularly in the case of bilateral treaties, the provisions will have been negotiated with close regard to the principles of the national legal systems of the two States involved. There was no wish to supplant those provisions, and to have done so would have created serious difficulties in determining, in particular cases, which set of rules was to be followed").

[207] For a discussion of this issue, see McClean (footnote 81 above), pp. 216–217.

[208] *Ibid.*; see also the International Convention for the Suppression of the Financing of Terrorism, article 16 (substantially similar language to the United Nations Convention against Corruption); and the United Nations Convention against Transnational Organized Crime, article 18, paragraphs 10–12 (language identical to the United Nations Convention against Corruption). McClean notes that "[i]t is one of the oddities of the text that the topic of the transfer of persons in custody appears so early in the mini-[mutual legal assistance treaty], before provisions dealing with the content for the request or the procedure for dealing with it" (McClean (footnote

provide a suitable basis for paragraphs within a draft article on mutual legal assistance (see proposed draft article 13, paragraphs 25 to 27, below).

139. Article 46, paragraphs 13 to 17, of the Convention addresses in some detail the procedures for sending a request from one State to another. Among other things, paragraphs 13 and 14 require States parties to: designate a central authority responsible for handling incoming and outgoing requests for assistance;[209] stipulate that requests must generally be written; call upon each State party to designate the language(s) the State party finds acceptable for incoming requests; and require States parties to notify the depositary of the United Nations Convention against Corruption (the Secretary-General of the United Nations) of the chosen central authority and acceptable languages.[210] Paragraph 15 designates what must be included in any request for mutual legal assistance, such as an indication of the subject matter and nature of the inquiry, and a statement of the relevant facts.[211] Paragraph 16 essentially allows the requested State to request supplemental information when that is either necessary to carry out the request under its national law, or when additional information would prove helpful in doing so.[212] Paragraph 17

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81 above), p. 218).

[209] Designation of a central authority "is a feature of many mutual legal assistance treaties and agreements" and thus is an obligation with which States are accustomed to complying (Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see footnote 172 above), p. 186, para. 7.25).

[210] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 7, paragraphs 8–9 ("8. Parties shall designate an authority, or when necessary authorities, which shall have the responsibility and power to execute requests for mutual legal assistance or to transmit them to the competent authorities for execution. The authority or the authorities designated for this purpose shall be notified to the Secretary-General. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the authorities designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through channels of the International Criminal Police Organization, if possible. 9. Requests shall be made in writing in a language acceptable to the requested Party. The language or languages acceptable to each Party shall be notified to the Secretary-General. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith"); and the United Nations Convention against Transnational Organized Crime, article 18, paragraphs 13–14 (language identical to the United Nations Convention against Corruption).

[211] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 7, paragraph 10 (identical language); the United Nations Convention against Transnational Organized Crime, article 18, paragraph 15 (identical language); the Model Treaty on Mutual Assistance in Criminal Matters (footnote 169 above), article 5, paragraph 1 (substantially similar language to the United Nations Convention against Corruption, but with the additional requirement that requests include: "(*f*) Specification of any time-limit within which compliance with the request is desired"); and the Revised Manual on the Model Treaty on Mutual Assistance in Criminal Matters (footnote 170 above), para. 106 ("Most instruments and schemes including the [United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances], the [United Nations Convention against Transnational Organized Crime], the [United Nations Convention against Corruption] and the Commonwealth Scheme [relating to Mutual Assistance in Criminal Matters] contain a list of contents of requests. While there are some differences in terms of detail and language, in general terms the lists in all of these instruments are very similar").

[212] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and

provides that the request is to be executed in accordance with the law of the requested State, and in line with the procedures specified by the requesting State so far as they do not conflict with the requested State's law.[213] The first clause of paragraph 17 helps preserve the integrity of the requested State's legal system, as the requested acts will occur in its territory, while the second clause emphasizes the desirability of complying with specific requests of the requesting State so that, for example, evidence collected is admissible under the procedural rules of its courts.[214]

140. Paragraphs 13 to 17 provide a suitable basis for paragraphs within a draft article on mutual legal assistance (see proposed draft article 13, paragraphs 10 to 14, below).

141. Article 46, paragraph 18, of the United Nations Convention against Corruption addresses testimony by witnesses through videoconferencing, a cost-effective technology that is becoming increasingly common. While testimony by videoconference is not mandatory, States are expected "to make provision wherever possible and consistent with the fundamental principles of domestic law for the use of videoconferencing as a means of providing viva voce evidence in cases where it is impossible or undesirable for a witness to travel".[215] Inclusion of this novel provision in article 18 of the United Nations Convention against Transnational Organized Crime[216] led to the adoption by the diplomatic conference of an interpretative note, which reads as follows:

> The *travaux préparatoires* should indicate that the delegation of Italy made a proposal on the matter covered by this paragraph (see A/AC.254/5/Add.23). During the debate on the proposal, it was pointed out that the following part of it, not reflected in the text of the Convention, could be used by States Parties as guidelines for the implementation of article 18, paragraph 18:
>
> "(*a*) The judicial authority of the requested State Party shall be responsible for the identification of the person to be heard and shall, on conclusion of the hearing, draw up minutes indicating the date and place of the

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Psychotropic Substances, article 7, paragraph 11 (identical language); the United Nations Convention against Transnational Organized Crime, article 18, paragraph 16 (identical language); and the Model Treaty on Mutual Assistance in Criminal Matters (footnote 169 above), article 5, paragraph 3.

[213] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 7, paragraph 12 (identical language); and the United Nations Convention against Transnational Organized Crime, article 18, paragraph 17 (identical language).

[214] See the Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (footnote 172 above), p. 190, paragraphs 7.35–7.36.

[215] *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 35 above), p. 174, paras. 628–629.

[216] The United Nations Convention against Transnational Organized Crime, article 18, paragraph 18, reads: "Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party."

hearing and any oath taken. The hearing shall be conducted without any physical or mental pressure on the person questioned;

"(*b*) If the judicial authority of the requested State considers that during the hearing the fundamental principles of the law of that State are infringed, he or she has the authority to interrupt or, if possible, to take the necessary measures to continue the hearing in accordance with those principles;

"(*c*) The person to be heard and the judicial authority of the requested State shall be assisted by an interpreter as necessary;

"(*d*) The person to be heard may claim the right not to testify as provided for by the domestic law of the requested State or of the requesting State; the domestic law of the requested State applies to perjury;

"(*e*) All the costs of the video conference shall be borne by the requesting State Party, which may also provide as necessary for technical equipment."[217]

Paragraph 18 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 24, below).

142. Article 46, paragraph 19, of the United Nations Convention against Corruption provides that the requesting State party is generally restricted in its ability to use or transmit information provided to it by the requested State party for purposes other than those set forth in its request, without prior consent of the requested State party.[218] There is an exception to this general obligation, however, when the information is exculpatory (in which case, the information can be disclosed to the alleged offender, but advance notice must be given to the requested State whenever possible). Paragraph 19 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 21, below).

143. Article 46, paragraph 20, of the United Nations Convention against Corruption allows the requesting State to require the requested State to keep the fact and substance of the request confidential, except to the extent necessary to execute the request.[219] Paragraph 20 provides a suitable basis for a paragraph within a draft

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[217] Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (see footnote 35 above), para. 41. See also McClean (footnote 81 above), pp. 226–227.

[218] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 7, paragraph 13 ("The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party"); the International Convention for the Suppression of the Financing of Terrorism, article 12, paragraph 3 (identical language to the United Nations Convention against Illicit Traffic in Narcotic Drug and Psychotropic Substances); and the United Nations Convention against Transnational Organized Crime, article 18, paragraph 19 (identical language to the United Nations Convention against Corruption).

[219] See also the United Nations Convention against Transnational Organized Crime, article 18, paragraph 20 (identical language); and the Model Treaty on Mutual Assistance in Criminal Matters (footnote 169 above), article 9 ("Upon request: (*a*) The requested State shall use its best endeavours to keep confidential the request for assistance, its contents and its supporting documents as well as the fact of granting of such assistance. If the request cannot be executed

article on mutual legal assistance (see proposed draft article 13, paragraph 22, below).

144. Article 46, paragraphs 21 to 23, of the Convention address the circumstances under which a request for mutual legal assistance may or may not be refused. Paragraph 21 lists a series of grounds for which refusal is permitted: (*a*) when the request does not conform to requirements of the article; (*b*) if the requested State considers that the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests; (*c*) when the authorities of the requested State party would be prohibited by its national law from carrying out the action requested with regard to any similar offence; and (*d*) when granting the request would be contrary to the requested State's legal system.[220] With respect to this last ground, an interpretative note was agreed upon during the drafting of the comparable paragraph of the United Nations Convention against Transnational Organized Crime, which reads as follows:

> The *travaux préparatoires* should indicate that the provision of paragraph 21 (d) of this article is not intended to encourage refusal of mutual assistance for any reason, but is understood as raising the threshold to more essential principles of domestic law of the requested State. The *travaux préparatoires* should also indicate that the proposed clauses on grounds for refusal relating to the prosecution or punishment of a person on account of that person's sex, race, religion, nationality or political opinions, as well as the political offence

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without breaching confidentiality, the requested State shall so inform the requesting State, which shall then determine whether the request should nevertheless be executed; (*b*) The requesting State shall keep confidential evidence and information provided by the requested State, except to the extent that the evidence and information is needed for the investigation and proceedings described in the request").

[220] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 7, paragraph 15 (identical language); the United Nations Convention against Transnational Organized Crime, article 18, paragraph 21 (identical language); the Model Treaty on Mutual Assistance in Criminal Matters (footnote 169 above), article 4, paragraph 1 ("Assistance may be refused if: (*a*) The requested State is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order (*ordre public*) or other essential public interest; (*b*) The offence is regarded by the requested State as being of a political nature; (*c*) There are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting a person on account of that person's race, sex, religion, nationality, ethnic origin or political opinions or that that person's position may be prejudiced for any of those reasons; (*d*) The request relates to an offence that is subject to investigation or prosecution in the requested State or the prosecution of which in the requesting State would be incompatible with the requested State's law on double jeopardy (*ne bis in idem*); (*e*) The assistance requested requires the requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction; (*f*) The act is an offence under military law, which is not also an offence under ordinary criminal law"); and the European Convention on Mutual Assistance in Criminal Matters, article 2 ("Assistance may be refused: (a) if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence; (b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country").

exception, were deleted because it was understood that they were sufficiently covered by the words "essential interests" in paragraph 21(b).[221]

Paragraph 23 requires the requested State to give reasons for any refusal of mutual legal assistance.[222] Paragraphs 21 and 23 provide a suitable basis for paragraphs within a draft article on mutual legal assistance (see proposed draft article 13, paragraphs 16 and 17, below).

145. By contrast, article 46, paragraph 22, of the United Nations Convention against Corruption indicates a ground upon which a request may *not* be refused, stating that "States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters".[223] Such a provision is appropriate in the context of corruption (as well as transnational organized crime), where the offence may include issues such as evasion of taxes, customs or duties. Yet such matters are not part of the offence of crimes against humanity and therefore inclusion of such a provision does not appear warranted for a draft article on mutual legal assistance.

146. Article 46, paragraph 24, of the United Nations Convention against Corruption provides that the request shall be expeditiously addressed, stating, *inter alia,* that the requested State party "shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party".[224] Paragraph 24 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 15, below).

147. At the same time, paragraph 25 provides that mutual legal assistance "may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding".[225] Paragraph 25 provides

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[221] Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (see footnote 35 above), para. 42.

[222] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 7, paragraph 16 ("Reasons shall be given for any refusal of mutual legal assistance"); the United Nations Convention against Transnational Organized Crime, article 18, paragraph 23 (language identical to the United Nations Convention against Corruption); and the Model Treaty on Mutual Assistance in Criminal Matters (footnote 169 above), article 4, paragraph 5 ("Reasons shall be given for any refusal or postponement of mutual assistance").

[223] See also the International Convention for the Suppression of the Financing of Terrorism, article 13 ("None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence"); and the United Nations Convention against Transnational Organized Crime, article 18, paragraph 22 (identical language to the United Nations Convention against Corruption).

[224] See also the United Nations Convention against Transnational Organized Crime, article 18, paragraph 24 (identical language). For discussion, see McClean (footnote 81 above), pp. 231–232.

[225] See also the United Nations Convention against Transnational Organized Crime, article 18, paragraph 25 (identical language); the Model Treaty on Mutual Assistance in Criminal Matters (footnote 169 above), article 4, paragraph 3 ("The requested State may postpone the execution of the request if its immediate execution would interfere with an ongoing investigation or prosecution in the requested State"); and the United Nations Convention against Illicit Traffic in

a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 18, below).

148. Article 46, paragraph 26, of the United Nations Convention against Corruption attempts to help avoid situations of complete refusal or extended delay of response to a request for mutual legal assistance by calling upon the requested State party first to "consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions".[226] Paragraph 26 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 19, below).

149. Article 46, paragraph 27, of the Convention is essentially a "safe conduct" provision, which gives individuals traveling to the requesting State's territory a measure of protection from prosecution, detention or punishment while they are in the territory for the purpose of testifying.[227] Paragraph 27 provides a suitable basis

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Narcotic Drugs and Psychotropic Substances, article 7, paragraph 17 ("Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary").

[226] See also the United Nations Convention against Transnational Organized Crime, article 18, paragraph 26 (identical language). For discussion, see McClean (footnote 81 above), pp. 232–233.

[227] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 7, paragraph 18 (identical language); the United Nations Convention against Transnational Organized Crime, article 18, paragraph 27 (identical language); the Scheme Relating to Mutual Assistance in Criminal Matters (the Harare Scheme), article 25 ("(1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country. (2) The immunity provided for in that paragraph shall cease: (a) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving have nevertheless remained in the requesting country, or having left that country have returned to it; (b) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country"); the European Convention on Mutual Assistance in Criminal Matters, article 12, paragraph 1 ("A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party"); and the Model Treaty on Mutual Assistance in Criminal Matters (footnote 169 above), article 15 ("1. Subject to paragraph 2 of the present article, where a person is in the requesting State pursuant to a request made under article 13 or 14 of the present Treaty: (*a*) That person shall not be detained, prosecuted, punished or subjected to any other restrictions of personal liberty in the requesting State in respect of any acts or omissions or convictions that preceded the person's departure from the requested State; (*b*) That person shall not, without that person's consent, be required to give evidence in any proceeding or to assist in any investigation other than the proceeding or investigation to which the request relates. 2. Paragraph 1 of the present article shall cease to

for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 23, below).

150. Article 46, paragraph 28, of the United Nations Convention against Corruption addresses the issue of costs, stating, *inter alia*, that "[t]he ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned".[228] An interpretative note for the identical provision in the United Nations Convention against Transnational Organized Crime provides some guidance:

> The *travaux préparatoires* should indicate that many of the costs arising in connection with compliance with requests under article 18, paragraphs 10, 11 and 18, would generally be considered extraordinary in nature. Further, the *travaux préparatoires* should indicate the understanding that developing countries may encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.[229]

Paragraph 28 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 28, below).

151. Article 46, paragraph 29, of the United Nations Convention against Corruption addresses the provision of government records, documents and information from the requested State to the requesting State and indicates that such information "shall" be provided, while non-public information "may" be provided.[230] Paragraph 29 provides a suitable basis for a paragraph within a draft article on mutual legal assistance (see proposed draft article 13, paragraph 20, below).

C. Draft article 13. Mutual legal assistance

152. In light of the sources indicated above, the Special Rapporteur is of the view that a draft article on mutual legal assistance for crimes against humanity should be modelled largely on the text used in article 46 of the United Nations Convention against Corruption. At present, 181 States have adhered to the text of the

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apply if that person, being free to leave, has not left the requesting State within a period of [15] consecutive days, or any longer period otherwise agreed on by the Parties, after that person has been officially told or notified that his or her presence is no longer required or, having left, has voluntarily returned. 3 A person who does not consent to a request pursuant to article 13 or accept an invitation pursuant to article 14 shall not, by reason thereof, be liable to any penalty or be subjected to any coercive measure, notwithstanding any contrary statement in the request or summons"). For discussion, see the Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (footnote 172 above), pp. 197–198, paragraph 7.55; and McClean (footnote 81 above), pp. 233–234.

[228] See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 7, paragraph 19 (identical language); and the United Nations Convention against Transnational Organized Crime, article 18, paragraph 28 (identical language).

[229] Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (see footnote 35 above), para. 43. See also McClean (footnote 81 above), pp. 234–236.

[230] See also the United Nations Convention against Transnational Organized Crime, article 18, paragraph 29 (identical language).

Convention, its provisions provide ample guidance as to all relevant rights, obligations and procedures for mutual legal assistance that may arise in the context of crimes against humanity (including in situations where there is no mutual legal assistance treaty between the States concerned), and its provisions are well understood by States, especially through detailed guides and resources developed by the UNODC.[231] Further, although a crime against humanity by its nature is quite different from a crime of corruption, the issues arising in the context of mutual legal assistance are largely the same regardless of the nature of the crime.

153. At the same time, some modifications are warranted. Certain stylistic changes are necessary for consistency with the draft articles already provisionally adopted, such as changing: "article" to "draft article"; "this Convention" to "the present draft articles"; "in the territory" of the State to "in territory under the jurisdiction" of the State; "domestic law" to "national law"; and "State Party" to "State". Likewise, in various places, additional changes are appropriate so as to clarify that the offences at issue are "crimes against humanity" rather than "criminal matters" generally. The clarity of article 46, paragraph 7, might be improved by replacing "the corresponding provisions of that treaty shall apply" with "the provisions of that treaty shall apply instead", for purposes of draft article 13, paragraph 9. Further, article 46, paragraphs 4 and 5, refer to "inquiries and criminal proceedings", whereas most other paragraphs (for example, paragraphs 1, 2, 10, 19) refer to "investigations, prosecutions and judicial proceedings". For purposes of harmonization, the latter phrase is used for draft article 13, paragraphs 6 and 7.

154. A few structural or substantive changes are also desirable. First, with respect to structural changes, several of the paragraphs are reordered so as to group paragraphs that address comparable issues together. Subheadings are added to assist the reader in identifying these groupings.

155. Second, with respect to substantive changes, in article 46, paragraph 3, the list of types of assistance might be altered given its application in relation to crimes against humanity, rather than corruption. To that end, the illustrative listing in subparagraph (f) ("including government, bank, financial, corporate or business records") is deleted as it unduly stresses financial records. The last two types of assistance listed — in subparagraphs (j) and (k)[232] — are uniquely tied to the United Nations Convention against Corruption, as they expressly refer to the detailed provisions of chapter V of that Convention on asset recovery. As such, they are not appropriate for the purposes of the present draft articles and have been deleted. Yet, given that a crime against humanity might entail situations where assets have been stolen in the course of the crime, and where mutual legal assistance regarding those assets might be valuable for proving the crime, subparagraph (g) is retained. To improve the drafting, the word "freezing" is moved from subparagraph (c) to subparagraph (g), so as to reformulate subparagraph (g) to read: "identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary purposes".

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[231] See footnote 35 above.

[232] Art. 46, para. 3 (j)–(k) ("(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention; (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention").

156. Article 46, paragraph 9, addresses the issue of a request for mutual legal assistance in the absence of dual criminality. Since the present draft articles are designed to ensure the existence of dual criminality for the offence of crimes against humanity, paragraph 9 is deleted as unnecessary.

157. Finally, article 46, paragraph 22, contains a provision that precludes a State party from refusing to provide mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters. As previously noted, such matters are not part of the offence of crimes against humanity, and therefore inclusion of such a provision does not appear warranted for a draft article on mutual legal assistance.

158. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 13. Mutual legal assistance

General cooperation

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences referred to in draft article 5 in accordance with this draft article.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with draft article 5, paragraph 7, in the requesting State.

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

(a) taking evidence or statements from persons;

(b) effecting service of judicial documents;

(c) executing searches and seizures;

(d) examining objects and sites;

(e) providing information, evidentiary items and expert evaluations;

(f) providing originals or certified copies of relevant documents and records;

(g) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) facilitating the voluntary appearance of persons in the requesting State; or

(i) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this draft article.

Transmission of information without a prior request

6. Without prejudice to national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The transmission of information pursuant to paragraph 6 of this draft article shall be without prejudice to investigations, prosecutions and judicial proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State shall notify the transmitting State prior to the disclosure and, if so requested, consult with the transmitting State. If, in an exceptional case, advance notice is not possible, the receiving State shall inform the transmitting State of the disclosure without delay.

Relationship to treaties on mutual legal assistance between the States concerned

8. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

9. Paragraphs 10 to 28 of this draft article shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the provisions of that treaty shall apply instead, unless the States agree to apply paragraphs 10 to 28 of this draft article in lieu thereof. States are strongly encouraged to apply those paragraphs if they facilitate cooperation.

Designation of a central authority

10. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of

the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State deposits its instrument of ratification, acceptance or approval of or accession to the present draft articles. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

11. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State at the time it deposits its instrument of ratification, acceptance or approval of or accession to the present draft articles. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

12. A request for mutual legal assistance shall contain:

(a) the identity of the authority making the request;

(b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;

(e) where possible, the identity, location and nationality of any person concerned; and

(f) the purpose for which the evidence, information or action is sought.

13. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

14. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to the national law of the requested State and where possible, in accordance with the procedures specified in the request.

15. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably

in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

16. Mutual legal assistance may be refused:

(a) if the request is not made in conformity with the provisions of this draft article;

(b) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(c) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

17. Reasons shall be given for any refusal of mutual legal assistance.

18. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

19. Before refusing a request pursuant to paragraph 16 of this draft article or postponing its execution pursuant to paragraph 18 of this draft article, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

20. The requested State:

(a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(b) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

21. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult

with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

22. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

Testimony of person from the requested State

23. Without prejudice to the application of paragraph 27 of this draft article, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

24. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by videoconference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in requested State

25. A person who is being detained or is serving a sentence in territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences referred to in draft article 5, may be transferred if the following conditions are met:

(a) the person freely gives his or her informed consent; and

(b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

26. For the purposes of paragraph 25 of this draft article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(d) The person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

27. Unless the State from which a person is to be transferred in accordance with paragraphs 25 and 26 of this draft article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

28. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

Chapter IV
Victims, witnesses and other affected persons

A. Overview

159. In the aftermath of the commission of a crime against humanity, issues relating to victims, witnesses and other affected persons invariably arise. Yet, at present, there is no global treaty addressing the rights of such persons under national law in the context of crimes against humanity.

160. First, victims, witnesses and others may wish to come forward with information pertaining to the commission of a crime, which may be of assistance in preventing further crimes, apprehending alleged offenders and prosecuting or extraditing those offenders. When this occurs, however, the person coming forward may be exposed to threats or intimidation by those who do not wish such information to be made available.

161. Second, victims may wish to participate in the proceedings brought against the alleged offender for a variety of reasons, including the ability to express their views and concerns, to verify facts and to secure recognition as victims.[233]

162. Third, victims may be interested in reparation from those responsible for the crime, which may take the form of restitution, compensation, satisfaction or some other form of reparation.[234]

163. International norms relating to the rights of victims have developed relatively recently, most notably since the 1980s.[235] As a result, many treaties addressing crimes under national law prior to this period contain no provisions with respect to victims or witnesses, such as: the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention for the suppression of unlawful seizure of aircraft; the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; and the International Convention against the taking of hostages.

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[233] See, for example, *Prosecutor* v. *Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on victims' participation, 18 January 2008*, Trial Chamber I, International Criminal Court, paragraph 39.

[234] Some commentators have noted the interrelationship between the "purpose of participation" and reparation. See, for example, A. Cassese, *et al.*, *Cassese's International Criminal Law*, 3rd ed., Oxford University Press, 2013, p. 387.

[235] Fernández de Casadevante Romani observes that "[t]hese international norms related to victims are also recent. The most ancient were born in the 1980s. The most recent belong to 2006", and further states that "[p]reviously, both international and domestic law had ignored the victim. Domestic law because the state's *ius puniendi* embodied in criminal law has traditionally had the criminal as the exclusive reference without considering the victim. International law because its approaches on the matter of responsibility have always been focused upon the author of the wrongful act: the state (in international law of human rights), the individual or states (in international humanitarian law) or the individual (in international criminal law), but always ignoring the victim" (C. Fernández de Casadevante Romani, *International Law of Victims*, Heidelberg, Springer, 2012, pp. 5–6).

164. Further, even after the 1980s, most global treaties concerned with terrorism did not address the rights of victims or witnesses,[236] including: the International Convention for the Suppression of Terrorist Bombings; the 1999 OAU [Organization of African Unity] Convention on the Prevention and Combating of Terrorism; the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; and the ASEAN Convention on Counter Terrorism.

165. On the other hand, there are treaties adopted since the 1980s concerning particular crimes that do address issues relating to victims and witnesses in national law, including some concerning crimes that might apply when crimes against humanity occur, such as torture or enforced disappearance. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment addresses the rights of victims and witnesses to protection, as well as the right of victims to redress and compensation (arts. 13-14). More recent treaties on corruption and transnational organized crime similarly include provisions on the rights of victims and witnesses.[237] Further, the statutes of international courts and tribunals that have jurisdiction over crimes against humanity have included provisions addressing victims and witnesses in the context of the operation of those courts and tribunals.[238]

166. The General Assembly has also provided guidance for States with respect to the rights of victims of crimes, including victims of crimes against humanity. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power addressed issues such as access to justice, fair treatment, restitution, compensation and assistance.[239] The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, while not entailing "new international or domestic legal obligations", nevertheless

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[236] See C. Fernández de Casadevante Romani, "International law of victims", in von Bogdandy and Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, vol. 14 (2010), pp. 219–272. There are, however, exceptions. See the International Convention for the Suppression of the Financing of Terrorism, article 8, paragraph 4 ("Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families"); and the Council of Europe Convention on the Prevention of Terrorism, article 13 ("Each Party shall adopt such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory. These measures may include, through the appropriate national schemes and subject to domestic legislation, *inter alia*, financial assistance and compensation for victims of terrorism and their close family members"). See also the Council of Europe Directorate General of Human Rights, Guidelines on the protection of victims of terrorist acts, adopted by the Committee of Ministers on 2 March 2005, in *Human rights and the fight against terrorism: the Council of Europe Guidelines*, 2005.

[237] See the United Nations Convention against Transnational Organized Crime, articles 24 and 25; and the United Nations Convention against Corruption, articles 32 and 33.

[238] See, for example, the Rome Statute of the International Criminal Court. See also the Rules of Procedure and Evidence of the International Criminal Court, rule 86 ("A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence"), available from www.icc-cpi.int/.../legal-texts/RulesProcedureEvidenceEng.pdf.

[239] General Assembly resolution 40/34 of 29 November 1985, Annex.

identified "mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms".[240]

167. Most treaties that address "victims", such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[241] do not provide a definition of that term, and instead allow States parties latitude for addressing its scope under their national laws. There are, however, some exceptions, such as the International Convention for the Protection of All Persons from Enforced Disappearance (article 24, paragraph 1, provides that "'victim' means the disappeared person and any individual who has suffered as the direct result of an enforced disappearance")[242] or the 2008 Convention on Cluster Munitions, which provides an even more expansive definition.[243] Under some treaties, only natural persons are covered, whereas under other treaties legal persons may be "victims" as well.[244] Rule 85, sub-rule (a), of the International Criminal Court's Rules of Procedure and Evidence defines "victims" as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".[245] Rule 85, sub-rule (b), extends the definition of victims to legal persons

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[240] General Assembly resolution 60/147 of 16 December 2005, Annex, preamble.

[241] While the Convention itself provides no definition, the Committee Against Torture observed: "Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention. ...The term 'victim' also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization" (Committee Against Torture, general comment No. 3 on the implementation of article 14 (CAT/C/GC/3), para. 3). Further, the Committee stated: "A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim" (*ibid*). The Committee's approach builds upon the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (see footnote above), para. 8. See also the draft declaration of international law principles on reparation for victims of armed conflict, International Law Association, The Hague Conference (2010), article 4, available from www.ila-hq.org/en/committees/index.cfm/cid/1018.

[242] See also D. Shelton, *Remedies in International Human Rights Law*, 3rd ed., Oxford University Press, 2015, pp. 241–242.

[243] Art. 2, para. 1 ("'Cluster munition victims' means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities").

[244] Compare article 1 of the American Convention on Human Rights: "Pact of San José, Costa Rica" (which only ensures the human rights of natural persons) with article 34 of the European Convention on Human Rights (which includes both natural and legal persons as the "victim of a violation").

[245] Rules of Procedure and Evidence of the International Criminal Court (see footnote 238 above), Rule 85, sub-rule (a). Pre-Trial Chamber I held that "[r]ule 85, sub-rule (a), "establishes four criteria that have to be met in order to obtain the status of victim: the victim must be a natural person; he or she must have suffered harm; the crime from which the harm ensued must fall within the jurisdiction of the Court; and there must be a causal link between the crime and the harm suffered" (*Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3,*

suffering direct harm, providing that "[v]ictims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes".[246]

168. Though the term "victim" is generally understood as including, at a minimum, the person who directly experienced the harm and immediate family members in the event that the victim has lost his or her life, most treaties have not sought to develop a definition, and instead have left the matter to specification within national legal systems, which already address the concept of "victim" in various contexts. Indeed, some participants in the inter-sessional open-ended working group that elaborated the International Convention for the Protection of All Persons from Enforced Disappearance noted that national courts should be given a certain amount of latitude in the designation of beneficiaries of reparations.[247] For the purposes of the present draft articles, it is appropriate to give States latitude in determining exactly which persons qualify as "victims" of a crime against humanity.

169. The remainder of this chapter discusses the three principal issues that arise with respect to victims, witnesses and others: protection of victims, witnesses and others; participation of victims in legal proceedings; and reparation for victims.

B. Complaints by and protection of victims and others

170. As noted above, many treaties addressing crimes under national law contain no provision with respect to victims or witnesses. Treaties that do contain such provisions typically address: (*a*) the right of individuals to complain to relevant authorities; and (*b*) protection by the State party of the complainant and witnesses, thereby allowing them to come forward without fear of ill-treatment or intimidation.

171. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 13:

> Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and

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VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, Pre-Trial Chamber I, International Criminal Court, para. 79).

[246] Rules of Procedure and Evidence of the International Criminal Court (see footnote 238 above), Rule 85, sub-rule (b). Pursuant to Rule 85, sub-rule (b), of the Rules of Procedure and Evidence of the International Criminal Court (see footnote 238 above), a legal person must have suffered "direct harm". There is no such limitation for natural persons under Rule 85, sub-rule (a). The Appeals Chamber held, however, that only persons who have suffered personal harm would be considered victims for the purposes of Rule 85, sub-rule (a). See *Prosecutor* v. *Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, 11 July 2008, Appeals Chamber International Criminal Court, paragraphs 32–39.

[247] See Commission on Human Rights, Report of the inter-sessional open-ended working group (footnote 160 above), paragraph 83.

> witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.[248]

172. With respect to the action of State authorities once a complaint has been filed, it should be noted that draft article 7 of the present draft articles currently provides that "[e]ach State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction".

173. With respect to protection, later treaties have expanded the category of persons beyond complainants and witnesses to other persons. For example, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption provide for the protection of witnesses "who give testimony concerning offences" established in accordance with the Conventions and, "as appropriate, for their relatives and other persons close to them".[249] Article 12, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance provides that:

> Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.[250]

174. By contrast, statutes of international criminal tribunals have been less expansive with respect to the types of persons to be protected. The Rome Statute of the International Criminal Court,[251] the Updated Statute of the International

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[248] See also Nowak and McArthur (footnote 67 above), p. 450.

[249] Article 24 of the United Nations Convention against Transnational Organized Crime and article 32 of the United Nations Convention against Corruption. The phrase "and other persons close to them" is intended to cover persons who may be subject to danger by virtue of a particularly close relationship with the witness, but who are not relatives, such as a cohabiting partner or business partner (see McClean (footnote 81 above), pp. 260–261).

[250] See also the Basic Principles and Guidelines … (footnote 240 above), paragraph 12 (b) (States should "[t]ake measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims").

[251] Art. 68, para. 1 ("The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses … particularly during the investigation and prosecution of such crimes").

Criminal Tribunal for the Former Yugoslavia,[252] the Statute of the International Tribunal for Rwanda[253] and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea[254] provide only for the protection of "victims" and "witnesses".[255]

175. Most treaties do not differentiate between the type of witness or victim for whom protective measures should be adopted. The Rome Statute of the International Criminal Court also emphasizes the position of children and victims of sexual or gender violence (art. 68, para. 2),[256] though one commentator has asserted that "[t]hese statements, which generally begin with the words 'in particular', are not much more than admonishments".[257]

176. Some treaties provide a list of specific measures that "may" be taken or that the State "shall consider" taking with respect to the protection of victims, witnesses and others.[258] For example, article 32, paragraph 2, of the United Nations Convention against Corruption provides:

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[252] See the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by Security Council resolution 827 of 25 May 1993, article 22 ("The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses"). See also the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (IT/2/Rev.50), rules 69 and 75, available from www.icty.org/en/documents/rules-procedure-evidence.

[253] Article 21 reads: "[t]he International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses". See also International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence (13 May 2015) (ITR/3/REV.1), Rules 69 and 75.

[254] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, art. 33 ("The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses"). See also Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.9), Rule 12 *bis*.

[255] By contrast, article 16 of the Statute of the Special Court of Sierra Leone (available from www.rscsl.org/documents.html), refers to protective measures for "witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses". Article 12, paragraph 4, of the Statute of the Special Tribunal for Lebanon (Security Council resolution 1757 (2007), attachment) provides for "measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, and such other appropriate assistance for witnesses who appear before the Special Tribunal and others who are at risk on account of testimony given by such witnesses".

[256] See also International Criminal Court, Office of the Prosecutor, Policy on children, available from www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF, and Policy paper on sexual and gender-based crimes, available from www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.

[257] W. A. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd ed., Oxford University Press, 2016, p. 1059.

[258] See the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, article 8, paragraphs 1 (f) and 5; the United Nations Convention against Transnational Organized Crime, article 24, paragraph 2; and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, article 6, paragraph 3.

2. The measures envisaged in paragraph 1 of this article may include, *inter alia*, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

177. Other detailed measures[259] mentioned in some treaties include: presenting evidence by electronic or other special means;[260] protecting the privacy and identity of witnesses and victims;[261] *in camera* proceedings;[262] withholding of evidence or information if disclosure may lead to the grave endangerment of the security of a witness or his or her family;[263] and relocating victims or witnesses.[264]

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[259] For detailed measures outlined in the Rules of Procedures of international criminal courts and tribunals, see the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (footnote 252 above), Rule 75; the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (footnote 253 above), Rule 69; the Rules of Procedure and Evidence of the International Criminal Court (footnote 238 above), Rules 87 and 88; and the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (footnote 254 above), Rule 29.

[260] See the Rome Statute of the International Criminal Court, article 68, paragraph 2 ("the Court may … allow the presentation of evidence by electronic or other special means"); the United Nations Convention against Transnational Organized Crime, article 24, paragraph 2 (b) ("Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means"); and the United Nations Convention against Corruption, article 32, paragraph 2 (b) (almost identical language to the United Nations Convention against Transnational Organized Crime).

[261] See the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, article 8, paragraph 1 (e) ("Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims"); and the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, article 33 ("Such protection measures shall include, but not be limited to … the protection of the victim's identity") (footnote 254 above).

[262] See the Rome Statute of the International Criminal Court, article 68, paragraph 2 ("the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera"); and the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, article 33 ("Such protection measures shall include, but not be limited to, the conduct of *in camera* proceedings") (footnote 254 above).

[263] See the Rome Statute of the International Criminal Court, article 68, paragraph 5 ("Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be

178. While suggesting or listing measures that might be taken has some benefits, ultimately the central obligation remains simply that the State must protect victims and witnesses, and the particular measures for doing so will inevitably vary according to the circumstances at issue, the capabilities of the relevant State and the preferences of the victims, witnesses and complainants. As such, the core provision as set forth in the International Convention for the Protection of All Persons from Enforced Disappearance (quoted above at paragraph 173) would appear suitable in the context of crimes against humanity.[265]

179. At the same time, measures of protection taken by the State may affect the rights of a defendant, such as limiting disclosure of the identity of the witnesses. Consequently, some treaties, such as the Rome Statute of the International Criminal Court,[266] the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,[267] the United Nations Convention against Transnational Organized Crime[268] and the United Nations Convention against Corruption,[269] also provide that any measures taken shall be without prejudice to the rights of the accused.[270]

180. In light of the above, there would appear to be merit in including in a draft article on victims, witnesses and others a provision addressing the right of individuals to complain to relevant authorities, and protection by the State of the complainant and others, drawing upon the text from the International Convention for the Protection of All Persons from Enforced Disappearance, taking into account draft article 7 and that any protective measures taken shall be without prejudice to the rights of the accused (see proposed draft article 14, paragraph 1, below).

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exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial").

[264] See the United Nations Convention against Transnational Organized Crime, article 24, paragraph 2 (a) ("Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons"), and the United Nations Convention against Corruption, article 32, paragraph 2 (a) (identical language).

[265] Article 12, paragraph 1, reads, in relevant part: "Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given."

[266] Art. 68, para. 1 ("These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial").

[267] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, para. 6 ("Nothing in the present article shall be construed to be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial").

[268] United Nations Convention against Transnational Organized Crime, art. 24, para. 2 ("The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant ...").

[269] Art. 32, para. 2 (almost identical language to the United Nations Convention against Transnational Organized Crime).

[270] See also the Basic Principles and Guidelines ... (footnote 240 above), para. 27 ("Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process").

C. Participation of victims in criminal proceedings

181. The right of victims to participate in criminal proceedings against an alleged offender usually is not included in treaties addressing crimes under national law, even in those (discussed in the previous subsection) containing provisions on the complaints by, and protection of, victims and witnesses.[271]

182. Some treaties addressing crimes under national law, however, do contain a provision on the participation of victims in the proceedings against the alleged offender. When this occurs, the relevant provision accords to States considerable flexibility as to the implementation of the obligation. For example, article 32, paragraph 5, of the United Nations Convention against Corruption provides that the right is subject to the State party's national law: "Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence." As suggested by the clause "subject to its domestic law", when the right to participate is included, States are given considerable flexibility as to the implementation of the obligation. Similar examples to this provision may be found in: the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;[272] the United Nations Convention against Transnational Organized Crime;[273] and the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[274] Providing such flexibility

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[271] For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains no such provision. The Committee Against Torture, however, has emphasized the importance of victim participation in processes for remedy and reparation. See general comment No. 3 (footnote 241 above), paragraph 4. The International Convention for the Protection of All Persons from Enforced Disappearance, while not providing expressly for the participation of victims in legal proceedings, has provisions relating to a victim's right to have access to information (art. 18) and right to know the truth regarding the circumstances of the enforced disappearance (art. 24). For an overview of national practices on victim participation, see Redress and Institute for Security Studies, "Victim participation in criminal law proceedings: survey of domestic practice for application to international crimes prosecutions", September 2015, available from www.redress.org/downloads/1508victim-rights-report.pdf.

[272] Art. 8 ("States parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by: … (c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law"). See also the Convention on the Rights of the Child, article 12, paragraph 2.

[273] Art. 25, para. 3 ("Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence").

[274] Art. 6, para. 2 ("Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases: … (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence"). The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime provides several obligations to protect migrants subject to conduct covered by the Convention but does not provide expressly for participation.

allows States to tailor the requirement for the participation of victims in a manner most suitable to their national systems.

183. The issue of participation by victims in legal proceedings was not addressed in the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia or the Statute of the International Tribunal for Rwanda. The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, however, allows for extensive participation of victims, who can even participate in legal proceedings as civil parties,[275] though it requires participants to meet relatively strict criteria.[276] Further, this approach reflects Cambodian national law, influenced by the French civil law system, which allows for victims to participate as civil parties in criminal proceedings.[277] The issue of participation was also addressed in article 68, paragraph 3, of the Rome Statute of the International Criminal Court, which provides:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.[278]

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[275] See the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (footnote 254 above), Rule 23 ("1. The purpose of Civil Party action before the [Extraordinary Chambers in the Courts of Cambodia] is to: a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the [Extraordinary Chambers in the Courts of Cambodia] by supporting the prosecution; and b) Seek collective and moral reparations, as provided in Rule 23 *quinquies*. 2. The right to take civil action may be exercised without any distinction based on criteria such as current residence or nationality. 3. At the pre-trial stage, Civil Parties participate individually. Civil Parties at the trial stage and beyond shall comprise a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers as described in IR 12 ter. The Civil Party Lead Co-Lawyers are supported by the Civil Party Lawyers described in IR 12 ter (3). Civil Party Lead Co-Lawyers shall file a single claim for collective and moral reparations. 4. The Civil Party cannot be questioned as a simple witness in the same case and, subject to Rule 62 relating to Rogatory Letters, may only be interviewed under the same conditions as a Charged Person or Accused").

[276] *Ibid.*, Rule 23 *bis* ("1. In order for Civil Party action to be admissible, the Civil Party applicant shall: a) be clearly identified; and b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based. When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true").

[277] See Co-Prosecutors' submission on civil party participation in provisional detention appeals, 22 February 2008, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 01), Pre-Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, available from www.eccc.gov.kh/en/documents/court/co-prosecutors-submission-civil-party-participation.

[278] See also the Rules of Procedure and Evidence of the International Criminal Court (footnote [illegible] above), Rules 89–93 and 131, subrule 2; and *Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation (footnote [illegible] above), paragraph [illegible] ("the Trial Chamber has borne in mind that proceedings before the Court are *sui generis* and the Court must develop trial procedures

184. One commentator notes that "[w]hen the *Rome Statute* was being drafted, few could have imagined the importance that this short and rather obscure provision would have upon proceedings at the Court"[279] as a result of the growth in participation. In August 2015, the Registry reported that in the years 2014 to 2015, 4,002 victims were admitted to participate in proceedings before the Court. During the same period, the Court also received 1,669 new applications for the participation of victims.[280]

185. In light of the above, there would appear to be merit in including in a draft article on victims, witnesses and others a provision addressing the right of victims to participate in criminal proceedings against an alleged offender, modelled on the text from the United Nations Convention against Corruption (see proposed draft article 14, paragraph 2, below).

D. Reparation for victims

186. Treaties that address crimes under national law and that contain a provision with respect to victims and witnesses typically also address the issue of reparation for victims. Such provisions appear inspired by provisions on the right to an "effective remedy" found in the 1948 Universal Declaration of Human Rights,[281] the International Covenant on Civil and Political Rights[282] and regional human rights treaties.[283]

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that meet the particular exigencies of the international case that it will have to decide").

[279] Schabas, *The International Criminal Court* (see footnote 257 above), p. 1062. Professor Schabas notes that the language for article 68, paragraph 3, of the Rome Statute of the International Criminal Court is drawn from the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (see footnote 239 above), which provide at paragraph 6 (b) that the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by "[a]llowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system". By contrast, the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (see footnote 240 above) do not contain a principle or guideline on the right to participation.

[280] Report of the International Criminal Court on its activities in 2014/15 (A/70/350), para. 27.

[281] See the Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948, article 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"). For an overview of the institutions and regimes on remedies for victims, see C. McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, 2012, chapter 2, and Shelton (footnote 242 above), chapter 3.

[282] Art. 2, para. 3 ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted"). See also the Human Rights Committee's general comment No. 31 (footnote 149 above).

187. The term "remedy", however, has not generally been used in treaties addressing crimes under national law. Instead emphasis has been placed on a right to pursue reparation, using either the term "reparation" itself or terms such as "compensation", "rehabilitation" or "restitution". For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 14:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

188. While article 14, paragraph 1, refers to "redress", "compensation" and "rehabilitation", the Committee Against Torture considers that paragraph 1 embodies a "comprehensive reparative concept".[284] According to the Committee:

> The obligations of States parties to provide redress under article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture

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paragraphs 16–17. ("16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations. 17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices").

[283] See the European Convention on Human Rights, article 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"), and the American Convention on Human Rights: "Pact of San José, Costa Rica", article 25 ("1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: *a*. To ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; *b*. To develop the possibilities of judicial remedy; and *c*. To ensure that the competent authorities shall enforce such remedies when granted").

[284] See the Committee Against Torture's general comment No. 3 (footnote [illegible] above), paragraph 2.

> and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.[285]

189. In particular, it should be noted that article 14, paragraph 1, provides that each "State Party shall ensure *in its legal system**". Such a phrase stresses that the obligation of the State party is to have necessary effective laws, regulations, procedures or mechanisms enabling victims to pursue adequate and appropriate redress for the harm they have suffered against those who are responsible. In implementing such an obligation, States parties may be guided by the provisions on access to justice set forth in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[286]

190. Many treaties concerned with crimes under national law focus solely on "compensation" as the relevant form of reparation. Examples of such treaties include: the International Convention for the Suppression of the Financing of Terrorism;[287] the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;[288] the United Nations Convention against Transnational Organized Crime;[289] the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;[290] and the United Nations Convention against Corruption.[291] While the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment emphasizes "fair and adequate compensation" (see the text quoted at paragraph 187 above), the Committee Against Torture has emphasized that

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[285] *Ibid.*, para. 5.

* Emphasis added.

[286] Basic Principles and Guidelines ... (see footnote 260 above), paras. 12-14.

[287] Art. 8, para. 4 ("Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims ... or their families").

[288] Art. 9, para. 4 ("States parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible").

[289] Article 25, paragraph 2 ("Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention") and also article 14, paragraph 2 ("When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners").

[290] Art. 6, para. 6 ("Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered").

[291] Art. 35 ("Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation").

compensation alone may not be sufficient redress for a victim of torture or ill-treatment.[292]

191. The Updated Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Tribunal for Rwanda contained provisions exclusively addressing the possibility of restitution of property,[293] not compensation or other forms of reparation. Yet, in the establishment of other international criminal courts and tribunals, there appears to be recognition that focusing solely on restitution is inadequate (instead, the more general term "reparation" is used) and that establishing an individual right to reparation for each victim may be problematic in the context of a mass atrocity. Consequently, allowance is made for the possibility of reparation for individual victims or for reparation on a collective basis.[294] For example, the International Criminal Court's Rules of Procedure and Evidence provide that in awarding reparation to victims pursuant to article 75 of the Rome Statute of the International Criminal Court,[295] "the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both", taking into account the scope and extent

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[292] See general comment No. 3 (footnote 241 above), paragraph 9; see also *Kepa Urra Guridi v. Spain*, Communication No. 212/2002, Report of the Committee Against Torture, *Official Records of the General Assembly, Sixtieth session, Supplement No. 44* (A/60/44), Annex VIII A, paragraph 6.8 ("article 14 of the Convention not only recognizes the right to fair and adequate compensation but also imposes on States the duty to guarantee compensation for the victim of an act of torture. The Committee considers that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case").

[293] See the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, article 24, paragraph 3 ("In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners") (footnote 252 above); and the Statute of the International Criminal Tribunal for Rwanda (footnote 253 above), article 23, paragraph 3 (identical language).

[294] See Basic Principles and Guidelines ... (footnote 200 above), paragraph 13 ("In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate"); and International Law Association, Reparation for Victims of Armed Conflict, Report of The Hague Conference (2010), paragraph (3) c and e of the commentary to article 6 ("The concept of collective reparation has been even less explored than the right to individual reparation. Still there are some developments that indicate that international law endorses collective reparation. ... Collective reparations also receive support from the Rules of Procedure and Evidence of the International Criminal Court") (available from www.ila-hq.org/en/committees/index.cfm/cid/1018).

[295] Art. 75 ("1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79"). The Appeals Chamber considered the principles and procedures to be applied to reparations in *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 [illegible], Judgment (of 3 March 2015) on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, Appeals Chamber, International Criminal Court.

of any damage, loss or injury.[296] In the context of the atrocities in Cambodia under the Khmer Rouge, only "collective and moral reparations" are envisaged under the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia.[297]

192. Perhaps under the influence of both the Commission's 2001 articles on responsibility of States for internationally wrongful acts[298] and the General Assembly's 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[299] the International Convention for the Protection of All Persons from Enforced Disappearance uses the broad term "reparation" but also provides a list of forms of reparation. Article 24, paragraphs 4 and 5, provides that:

> 4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.
>
> 5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:
>
> (a) Restitution;
>
> (b) Rehabilitation;
>
> (c) Satisfaction, including restoration of dignity and reputation;
>
> (d) Guarantees of non-repetition.

193. All the traditional types of reparation would appear potentially relevant in the aftermath of the commission of crimes against humanity.[300] Restitution, or the return to the status quo *ex ante*, may be an appropriate form of reparation, including the ability for a victim to return to his or her home, the return of moveable property or the reconstruction of infrastructure. Compensation may be appropriate with respect to both material and moral damages. Rehabilitation programs for large numbers of persons in certain circumstances may be required, such as programmes for medical treatment, provision of prosthetic limbs, trauma-focused therapy or reconstruction of public or private buildings, including schools, hospitals and places of religious worship. Satisfaction may also be a desirable form of reparation, such as issuance of a statement of apology or regret. Likewise, reparation for a crime against humanity might consist of assurances or guarantees of non-repetition.

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[296] Rules of Procedure and Evidence of the International Criminal Court (see footnote 230 above), Rule 97, sub-rule 1. See, generally, McCarthy (footnote 281 above).

[297] Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (see footnote 254 above), Rules 23 and 23 *quinquies*.

[298] See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

[299] Basic Principles and Guidelines ... (see footnote 200 above), paras. 15 and 18–23.

[300] The Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence has stressed the importance of adopting a "broad array of coherently organized measures" for victims of massive violations, distinguishing between reparation programmes with material and symbolic measures and those that distribute benefits to individuals or collectivities (report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/69/518), para. 88).

194. Moreover, while reparation specific to each of the victims may be warranted, such as through the use of regular civil claims processes in national courts or through a specially designed process of mass claims compensation,[301] in some situations only collective forms of reparation may be feasible or preferable, such as the building of monuments of remembrance or the reconstruction of schools, hospitals, clinics and places of worship. In still other situations, a combination of individual and collective reparations may be appropriate.

195. As such, there would appear to be value in a draft article that addresses reparation for victims, which builds upon the text used in the International Convention for the Protection of All Persons from Enforced Disappearance, while allowing for flexibility as to the exact nature and form that such reparation should take (see proposed draft article 14, paragraph 3, below).

E. Draft article 14. Victims, witnesses and others

196. Based on the aforementioned considerations, the following draft article is proposed:

Draft article 14. Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:

(a) any individual who alleges that a person has been subjected to a crime against humanity has the right to complain to the competent authorities; and

(b) complainants, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. These measures

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[301] See, for example, M. Frigessi di Rattalma and T. Treves (eds.), *The United Nations Compensation Commission: a Handbook*, The Hague, Kluwer Law International, 1999; H. van Houtte, "Mass property claim resolution in a post-war society: the Commission for Real Property Claims in Bosnia and Herzegovina", in The International Bureau of the Permanent Court of Arbitration (ed.), *Institutional and Procedural Aspects of Mass Claims Settlement Systems*, The Hague, Kluwer Law International, 2000, pp. 23–42; The International Bureau of the the Permanent Court of Arbitration (ed.), *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges*, Oxford University Press, 2006; H. M. Holtzmann and E. Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, Oxford University Press, 2007; H. van Houtte, B. Delmartino and I. Yi, *Post-War Restoration of Property Rights under International Law, Volume I: Institutional Features and Substantive Law*, Cambridge University Press, 2008; H. Das and H. van Houtte, *Post-War Restoration of Property Rights under International Law, Volume II: Procedural Aspects*, Cambridge University Press, 2008; C. R. Payne and P. H. Sand (eds.), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability*, Oxford University Press, 2011; R. P. Alford, "The Claims Resolution Tribunal", in C. Giorgetti (ed.), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*, Leiden, Martinus Nijhoff, 2012, pp. 575–590; and S. D. Murphy, W. Kidane and T. R. Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission*, Oxford University Press, 2013.

shall be without prejudice to the rights of the alleged offender referred to in draft article 10.

2. Each State shall, subject to its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 10.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation, on an individual or collective basis, consisting of one or more of the following forms: restitution; compensation; rehabilitation; satisfaction; guarantees of non-repetition.

Chapter V

Relationship to competent international criminal tribunals

A. Potential for conflicts

7. In considering the Commission's work on this topic, several States in the Sixth Committee have stressed that the draft articles on crimes against humanity should avoid any conflict with the rights or obligations of States with respect to competent international criminal tribunals,[302] with many States specifically mentioning the need to avoid any conflict with the Rome Statute of the International Criminal Court.[303]

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[302] See, for example, Austria, *Official Records of the General Assembly, Seventieth session, Sixth Committee, 20th meeting* (A/C.6/70/SR.20), paragraph 30 ("it would be useful if the legal relationship [between the draft articles and the constituent instruments of international or hybrid criminal courts] was explicitly reflected in the final draft articles, otherwise, the *lex posterior* regime of the Vienna Convention on the Law of Treaties could generate different results"); Germany, *ibid., 22nd Meeting* (A/C.6/70/SR.22), paragraph 15 ("To ensure its success, this project must be compatible with existing rules and institutions of international criminal law"); Hungary, *ibid., 21st meeting* (A/C.6/70/SR.21), paragraph 83 ("recognizing the need to avoid conflict with other existing legal regimes in the field"); India, *ibid.*, paragraph 65 ("in view of the existing legal regimes and mechanisms, it would require in-depth study and thorough discussion in the Commission. The proposed obligations should not conflict with existing treaty obligations and should not duplicate existing regimes"); Italy, *ibid., 17th meeting* (A/C.6/70/SR.17), paragraph 58 ("[Italy] endorsed the Commission's view that the draft articles should avoid any conflicts with obligations of States arising under the constituent instruments of international or 'hybrid' criminal courts or tribunals"); Japan, *ibid., 22nd meeting* (A/C.6/70/SR.22), paragraph 130 ("The current work should avoid any legal conflicts with the obligations of States arising under the constituent instruments of international courts or tribunals"); Malaysia, *ibid., 23rd meeting* (A/C.6/70/SR.23), paragraph 47 ("the draft convention on crimes against humanity should be drafted in such a way as to ensure that any further work complemented, and did not overlap with, existing regimes"); Mexico, *ibid., 21st meeting* (A/C.6/70/SR.21), paragraph 51 ("The Commission's work on the topic should complement the relevant existing instruments"); Portugal, *ibid., 22nd meeting* (A/C.6/70/SR.22), paragraph 61 ("the topic should be addressed with caution, taking into account the existing legal framework concerning crimes against humanity. It was important to avoid entering into conflict with regimes already in place"); and the Republic of Korea, *ibid., 23rd meeting* (A/C.6/70/SR.23), paragraph 56 ("In drafting a convention on crimes against humanity, the relevant provisions in existing treaties and the interrelationship of those provisions should be examined in detail to avoid conflicts with other treaty regimes").

[303] See, for example, the Netherlands, *ibid., 21st meeting* (A/C.6/70/SR.21), paragraph 42 ("It would also be pertinent to address the relation between the draft articles on crimes against humanity and the Rome Statute [of the International Criminal Court]. States parties to the ... Statute were obliged to implement its provisions, including those on crimes against humanity, in their respective national legal systems. Any subsequent instrument on the same topic should build on that existing practice"); Slovenia, *ibid., 23rd meeting* (A/C.6/70/SR.23), paragraph 4 ("any new convention on crimes against humanity should be consistent with, and complement, the provisions [of the Rome Statute of the International Criminal Court]"); the United Kingdom, *ibid.*, paragraph 36 ("Any additional regime would need to complement rather than compete with the Rome Statute [of the International Criminal Court]"); Spain, *ibid., Sixty-ninth session, 21st meeting* (A/C.6/69/SR.21), paragraph 42 ("it would be necessary to consider carefully ... [the draft convention's] precise relationship with the [Rome Statute of the International Criminal Court] and the International Criminal Court"); Trinidad and Tobago, *ibid., 20th*

198. With that in mind, the draft articles have been written to avoid any such conflicts.[304] For example, draft article 9 allows a State to fulfil its *aut dedere aut judicare* obligation through surrender to a "competent international criminal tribunal". Thus, where a State has an obligation to surrender, it can do so without encountering any conflict with draft article 9. Moreover, the draft articles generally have been designed to promote harmony with the constituent instruments of competent international criminal tribunals, such as by using in draft article 3 the definition of "crimes against humanity" found in the Rome Statute of the International Criminal Court.

199. As such, there do not appear to be any conflicts between the rights or obligations of States set forth in the draft articles and their rights and obligations with respect to competent international criminal tribunals. Even so, there would appear to be value in expressly addressing an unforeseen situation where a conflict might arise. Otherwise, in the event that a convention is adopted based on the draft articles, a conflict between a State's rights or obligations under that convention and its rights or obligations under a treaty establishing an international criminal tribunal might depend on which instrument is more recent.[305]

200. There are various examples of provisions that attempt to address potential conflicts, whereby rights or obligations under one treaty supersede those arising under another. Article 103 of the Charter of the United Nations provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The Marrakesh Agreement Establishing the World Trade Organization provides: "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict" (art. XVI, para. 3). In light of such examples, and in light of the reference in draft article 9 to "competent international criminal tribunal", one possible formulation for the present draft articles might be: "In the event of a conflict between the rights or obligations of a State under the present draft articles and its rights or obligations under the constitutive instrument of a competent international criminal tribunal, the latter shall prevail."

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meeting (A/C.6/69/SR.26), paragraph 118 ("The project should not detract from, but rather complement the Rome Statute of the International Criminal Court"); and the United Kingdom, *ibid., 19th meeting* (A/C.6/69/SR.19), paragraph 160 ("It was important that the work of the International Criminal Court in that area should not be affected").

[304] There are, of course, a variety of tribunals that have been constituted to address international crimes of a serious nature, ranging from tribunals established exclusively under international law, under a mixture of international and national law (sometimes referred to as "hybrid tribunals"), and exclusively under national law. Whether a particular tribunal is an "international criminal tribunal" will depend on how the tribunal was constituted. Further, the obligations of States with respect to any given tribunal will also vary. For example, the agreement of the United Nations with Sierra Leone creating the Special Court for Sierra Leone places no express obligations on other States to cooperate with the tribunal. See the Statute of the Special Court for Sierra Leone (footnote 255 above); and United Nations Security Council resolution 1315 (2000) of 14 August 2000 (requesting the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create the Special Court).

[305] See the 1969 Vienna Convention, article 30.

201. Consideration might also be given as to whether it is necessary to include an even broader provision in the present draft articles relating to *any* conflict with other international or national law or instruments. As a general matter, treaties concerning crimes in national law, as well as human rights treaties, do not address the broad possibility of conflicts with other sources of rights or obligations. As such, most treaties are drafted provision-by-provision to take account of any such conflicts, and leave any other possible conflicts to be resolved through the law of treaties, as contained in the 1969 Vienna Convention on the Law of Treaties (hereinafter "1969 Vienna Convention") and customary international law, or other rules of international law addressing conflicts.[306]

202. Even so, some treaties do contain provisions addressing in a broad fashion the possibility of conflicts between the treaty and other rules. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains a "without prejudice" clause with respect to other treaties and national laws on torture, extradition or expulsion. Specifically, article 16, paragraph 2, of the Convention provides: "The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion." While such a provision addresses both international and national law, it does not expressly address a situation where such law provides lesser protection than contained in the Convention.[307]

203. Some other treaties focus solely on the treaty's relationship with international law, asserting that nothing in the treaty "shall affect other rights, obligations and responsibilities of States under international law". Thus, the International Convention for the Suppression of Terrorist Bombings provides in article 19, paragraph 1, that "[n]othing in this convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law". The International Convention for the Suppression of the Financing of Terrorism similarly provides in article 21 that "[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions".

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[306] See *Yearbook ... 2006*, vol. II (Part Two), chapter XII, on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".

[307] According to Nowak and McArthur, "[a]rticle 16(2) makes it clear that any wider protection mechanism relating to cruel, inhuman or degrading treatment in national or international law is not affected by the provisions of the Convention. Accordingly, in so far as other international instruments or national laws provide better protection to individuals, they are entitled to benefit from it; however, other international instruments or national laws can never restrict the protection which the individual enjoys under the Convention. A typical example of the application of the savings clause in Article 16(2) is the *non-refoulement* principle derived from Article 3 [of the European Convention on Human Rights] and Article 7 [of the International Covenant on Civil and Political Rights] which, according to the jurisprudence of the relevant treaty bodies, applies not only to the danger of being subjected to torture (as in Article 3 [of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]), but also to the danger of being subjected to cruel, inhuman or degrading treatment" (Nowak and McArthur (see footnote 67 above), p. 575, para. 78).

Here, too, such a provision does not expressly address a situation where other instruments provide lesser protection than the relevant convention.

204. In contrast, the International Convention for the Protection of All Persons from Enforced Disappearance specifically addresses the situation where either international or national law provides lesser protection than the Convention. Article 37 of that Convention states: "Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in: (a) The law of a State Party; (b) International law in force for that State." Thus, in a situation where other international or national law is less "conducive to the protection of all persons from enforced disappearance", the relevant provisions of the International Convention for the Protection of All Persons from Enforced Disappearance take precedence.

205. Such a broad provision addressing potential conflicts might be included in the present draft articles, but these draft articles have been crafted so as generally to prevail over conflicting national law, except as otherwise specified in the context of particular draft articles. For example, draft article 3, which contains a definition of crimes against humanity, provides in paragraph 4 that the draft article is without prejudice to any broader definition provided for in "any international instrument or national law". Draft article 5, paragraph 7, provides that "*[s]ubject to the provisions of its national law*,* each State shall take measures, where appropriate, to establish the liability of legal persons". Draft article 6, paragraph 3, provides that "[t]he present draft articles do not exclude the exercise of any criminal jurisdiction established by a State *in accordance with its national law**". Draft article 8 states in its paragraph 1 that "custody and legal measures shall be *as provided in the law of that State*,* but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted". Draft article 9 provides that the authorities of a State shall take the decision regarding whether to prosecute "in the same manner as in the case of any other offence of a grave nature under the law of that State". Draft article 10, paragraph 1, provides for the full protection of an alleged offender's rights "under applicable national and international law", while paragraph 3 provides that rights of consular access "shall be exercised in conformity with the laws and regulations" of the host State, provided that those laws and regulations enable full effect to be given to such rights. Though not yet considered by the Commission, several provisions proposed in this report also seek to calibrate the relationship between the present draft articles and other sources of law, such as in proposed draft article 11 on extradition, proposed draft article 13 on mutual legal assistance and proposed draft article 14 on victims, witnesses and others.

206. One difficulty with crafting a broad provision on potential conflicts is that it might inadvertently undermine the present draft articles anytime they conflict with national law. For example, a provision allowing for the operation of national law whenever it is more conducive to the protection of persons from crimes against humanity might be viewed as allowing a State to deviate from the protections accorded to the alleged offender under draft article 10. Consequently, in light of the attention already given in the present draft articles to addressing possible conflicts in context of specific issues, a broader provision is not recommended in this report.

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* Emphasis added.

B. Draft article 15. Relationship to competent international criminal tribunals

207. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

> ***Draft article 15. Relationship to competent international criminal tribunals***
>
> In the event of a conflict between the rights or obligations of a State under the present draft articles and its rights or obligations under the constitutive instrument of a competent international criminal tribunal, the latter shall prevail.

Chapter VI
Federal State obligations

A. Overview

208. Article 29 of the 1969 Vienna Convention provides: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[308] Thus, normally a treaty binds a State with respect to its entire territory, including States that are "federal" in nature, in which significant autonomy is accorded to the constituent parts of the State.[309] Yet "a different intention" may be expressed either in the treaty itself or by States, through reservations or declarations, when signing or ratifying a treaty.[310] When the latter occurs, other States may react by accepting or rejecting such reservations or declarations.[311] To address such circumstances, treaties that address a specific subject matter, such as criminal jurisdiction, sometimes seek to address the scope and application of that treaty to different levels of national jurisdiction.[312]

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[308] For commentary, see O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: a Commentary*, Berlin, Springer, 2012, pp. 489–503; O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: a Commentary*, Oxford University Press, 2011; and M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Martinus Nijhoff, 2009, pp. 389–394.

[309] See D. B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford University Press, 2012, p. 314; and Dörr and Schmalenbach (footnote above), p. 493. See also *Yearbook... 1966*, vol. II (A/CN.4/SER.A/1966/Add.1), p. 213, paragraph (4) of the commentary to article 25 ("One Government proposed that a second paragraph should be added to the article providing specifically that a State, which is composed of distinct autonomous parts, should have the right to declare to which of the constituent parts of the State a treaty is to apply. Under this proposal the declaration was not to be considered a reservation but a limitation of the consent to certain parts only of the State. The Commission was of the opinion that such a provision, however formulated, might raise as many problems as it would solve. It further considered that the words 'unless a different intention appears from the treaty or is otherwise established' in the text now proposed give the necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory").

[310] Dörr and Schmalenbach (see footnote 308 above), p. 493. See also A. Aust, *Modern Treaty Law and Practice*, 3rd ed., Cambridge University Press, 2013, p. 189 (noting that "only in the last forty or so years ... federations have sought to use reservations to deal with their problems in participating in treaties").

[311] See Hollis (footnote 309 above), p. 719 ("it is important to recognize that where a treaty neither prohibits nor permits federalism accommodations, several federal States have made reservations to limit their obligations to those areas of legislative jurisdiction that the federal government has assumed. On occasion, other States have objected to such reservations"). The Secretary-General's practice with respect to federal clauses is that "[d]eclarations of territorial application are to be distinguished from declarations made under 'federal clauses' in treaties whose subject-matter falls within the legislative jurisdiction of constituent States, provinces or other territorial units" (United Nations, *Summary of practice of the Secretary-General as depositary of multilateral treaties* (United Nations publication, Sales No. E/F.94.V.15, document ST/LEG/7/Rev.1), para. 272). Where declarations are made pursuant to federal clauses, the Secretary-General "duly circulates and records such declarations" (*ibid.*).

[312] Dörr and Schmalenbach (see footnote 308 above), pp. 492–493.

209. There are different ways that treaties have sought to address the issue of federal State obligations.[313] Some treaties "include a 'territorial clause' where the treaty may apply to some of a State's sub-federal territorial units but not others" or "may include a 'federal State clause' that limits the scope of the treaty's obligations to those that the federal State's government has constitutional authority to assume".[314] For example, the 1980 United Nations Convention on contracts for the international sale of goods contains a "territorial clause" which provides: "If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time" (art. 93, para. (1)). Although territorial clauses are "mostly confined to treaties on commercial law, private law or private international law",[315] federal State clauses have been used in a range of treaties. Yet in recent years there has been less enthusiasm for federal State clauses, especially in the context of human rights obligations, where differentiated obligations within a State are viewed as inappropriate.[316] Indeed, "[t]he serious complications to which the 'federal clause' has given rise are probably responsible for the growing distrust levelled against it".[317]

210. As a result, some treaties include clauses that expressly deny any accommodation to federal States.[318] For example, article 50 of the International Covenant on Civil and Political Rights provides that its "provisions ... shall extend to all parts of federal States without any limitations or exceptions".[319] The 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty contains the same provision in

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[313] Hollis (see footnote 309 above), p. 719 (indicating that States may opt to include "clauses that: (a) authorize limited exceptions to a treaty's obligations for federal States; (b) differentiate implementation among federal and non-federal States; (c) limit treaty obligations to the 'national' level; or (d) reject any accommodation for federal States"). For examples of each type of clause, see *ibid.*, pp. 720–723.

[314] Hollis (see footnote 309 above), p. 719. See also R. B. Looper, "'Federal State' clauses in multilateral instruments", *The British Yearbook of International Law 1995–6*, vol. 32 (1957), pp. 162–203, at p. 164 ("The 'federal State' clause, then, is a method of qualifying multilateral treaty obligations at their inception. Such a clause is a concession granted to federal States in view of their peculiar constitutional structure. Concession it certainly is, for its main effect is to create a disparity of obligations between federal and unitary signatories to multilateral instruments").

[315] Aust (see footnote 310 above), p. 188.

[316] See, for example, Hollis (footnote 309 above), p. 316 ("In recent years, there seems to be less enthusiasm for federal clauses ... especially where human rights treaties are designed to establish universal minimum standards").

[317] Corten and Klein (see footnote 308 above), p. 745, para. 41.

[318] Hollis (see footnote 309 above), p. 316.

[319] There are 168 States parties to the Covenant, including several States with federal systems (Australia, Canada, Germany, Switzerland and the United States of America). For analysis, see M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev. ed., Kehl, Germany, N.P. Engel, 2005, p. 809 (noting that "the express rule that the provisions of the Covenant extend to all parts of federal States without limitation or exception only serves to make clear that which in the absence of a federal clause in any event applies under international law").

its article 9.[320] Similarly, article 41 of the International Convention for the Protection of All Persons from Enforced Disappearance provides that its "provisions … shall apply to all parts of federal States without any limitations or exceptions".

B. Draft article 16. Federal State obligations

211. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 16. Federal State obligations

The provisions of the present draft articles shall apply to all parts of federal States without any limitations or exceptions.

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[320] Art. 9 ("The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions"). There are 84 States parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, including several States with federal systems (Australia, Canada, Germany and Switzerland).

Chapter VII
Monitoring mechanisms and dispute settlement

212. In the event that the present draft articles are used as a basis for a convention, consideration may be given to the value of one or more mechanisms for monitoring a State's implementation of and compliance with the convention.

213. The purpose of this chapter is to analyse existing monitoring mechanisms with respect to crimes against humanity, supplemental monitoring mechanisms that might be considered by States for a convention, and the issue of inter-State dispute settlement.

A. Existing monitoring mechanisms

214. Currently there are numerous mechanisms that monitor potential situations of crimes against humanity, which can only briefly be surveyed. In the United Nations system, the Security Council, General Assembly and Secretariat regularly identify and respond to potential crimes against humanity. Subsidiary bodies or offices of the United Nations, including the Human Rights Council and the Office of the Special Adviser on the Prevention of Genocide, also monitor situations that involve crimes against humanity. Treaty bodies established by human rights instruments have addressed crimes against humanity to the extent that they relate to the body's mandate. Finally, international tribunals and regional tribunals have helped identify and address crimes against humanity.

215. Under Article 39 of the Charter of the United Nations, the Security Council is tasked with determining the existence of a threat to peace, breach of the peace or act of aggression, as well as making recommendations and deciding on measures to maintain or restore international peace and security. As such, situations of crimes against humanity can fall within the Council's mandate. The Security Council can receive information regarding potential crimes against humanity from numerous sources, including letters from States,[321] groups of States[322] and the Secretary-

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[321] See, for example, the letter dated 14 January 1994 from the Permanent Respresentative of Bosnia and Herzegovina to the United Nations addressed to the President of the Security Council (S/1994/45, Annex) (presenting a letter from the Mayor of the city of Tuzla reporting crimes against humanity in his city); the letter dated 15 April 1994 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council (S/1994/453) (informing the Security Council of reports that the safe area of Gorazde in Bosnia was about to fall as part of an ongoing campaign of crimes against humanity); the letter dated 30 January 1997 from the Permanent Representative of Afghanistan to the United Nations addressed to the President of the Security Council (S/1997/96, Annex) (reporting mass deportation of ethnic Tajiks in Afghanistan by the Taliban and stating that the State strongly believed such acts were crimes against humanity); the letter dated 16 January 1999 from the Permanent Representative of Albania to the United Nations addressed to the President of the Security Council (S/1999/50*) (calling for immediate action of the Security Council to address crimes against humanity in Kosovo); and the letter dated 16 January 2003 from the Permanent Representative of the Democratic Republic of the Congo to the United Nations addressed to the President of the Security Council (S/2003/52) (reporting that mass rape and other atrocities had occurred in the the Democratic Republic of the Congo and calling on the Security Council to act to punish those responsible for crimes against humanity).

General,[323] and reports from the Prosecutor of the International Criminal Court.[324] In response to this information, the Security Council can adopt resolutions,[325] call for a commission of inquiry to be carried out by the Secretariat[326] or issue a Statement of the President, on behalf of all 15 members of the Council.[327]

216. The General Assembly also has identified potential situations of crimes against humanity and called on States to respond. Under Article 10 of the Charter of the United Nations, the General Assembly may discuss any questions or matters within the scope of the Charter of the United Nations, one of which is to maintain international peace and security (Art. 1). Similar to the Security Council, when information regarding crimes against humanity is brought to the attention of the

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[322] See, for example, the letter dated 26 January 1999 from the Chargé D'affaires a.i. of the Permanent Mission of Qatar to the United Nations addressed to the President of the Security Council (S/1999/76*) (statement of the Islamic Group at the United Nations condemning crimes against humanity being committed in Kosovo).

[323] See, for example, the letter dated 24 May 1994 from the Secretary-General to the President of the Security Council (S/1994/674), paragraphs 72–86 (transmitting the results of a commission of inquiry into crimes in the former Yugoslavia, specifically identifying acts that occurred which constitute crimes against humanity); and the letter dated 19 December 2014 from the Secretary-General addressed to the President of the Security Council (S/2014/928) (transmitting the results of the commission of inquiry into the Central African Republic, which concluded that crimes against humanity occurred).

[324] See, for example, International Criminal Court, Sixteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), available from http://iccforum.com/media/background/general/2012-12_ICC_OTP-16th_Report_of_Prosecutor_to_UNSC.pdf (stating that the Office of the Prosecutor is continuing to monitor alleged attacks against civilians in Darfur that could be a part of ongoing crimes against humanity).

[325] See, for example, Security Council resolution 556 of 23 October 1984 (condemning the apartheid system in South Africa and acknowledging that the system has been characterized as a crime against humanity); Security Council resolution 1970 of 26 February 2011 (considering that widespread attacks in Libya against civilians may amount to crimes against humanity); Security Council resolution 1975 of 30 March 2011 (considering that acts committed in Cote d'Ivoire could amount to crimes against humanity); Security Council resolution 2165 of 14 July 2014 (expressing grave alarm at indiscriminate attacks in populated areas of Syria and stating that such acts may amount to crimes against humanity); Security Council resolution 2187 of 25 November 2014 (expressing grave concern that there are reasonable grounds to believe crimes against humanity have been committed in South Sudan); and Security Council resolution 2217 of 28 April 2015 (stating that acts of violence in the Central African Republic may amount to crimes against humanity).

[326] See, for example, Security Council resolution 2127 of 5 December 2013 (calling for the establishment of a Commission of Inquiry into the Central African Republic).

[327] See, for example, the Statement by the President of the Security Council of 5 November 2014 (S/PRST/2014/22) (calling on the Great Lakes Region to neither harbour nor provide protection of any kind to persons accused of human rights abuses, in particular crimes against humanity); the Statement by the President of the Security Council of 11 June 2015 (S/PRST/2015/12) (reiterating the Security Council's condemnation of attacks by the Lord's Resistance Army in the Central African Republic, including acts that may constitute crimes against humanity); and the Statement by the President of the Security Council of 9 November 2015 (S/PRST/2015/20) (urging the Government of the Democratic Republic of the Congo to continue efforts to bring to justice perpetrators of human rights abuses, in particular those that may amount to crimes against humanity).

General Assembly, it can respond by passing resolutions[328] as well as by calling for commissions of inquiry to be administered by the Secretariat.

217. The Secretariat monitors crimes against humanity in conjunction with the other United Nations organs. It administers commissions of inquiry on crimes against humanity as requested by the Security Council, the General Assembly and subsidiary bodies, such as the Human Rights Council. Upon completion of the inquiry, the Secretariat reports its findings to the body that requested the inquiry.[329] The Secretariat can also monitor the implementation of Security Council[330] and General Assembly resolutions.[331] Additionally, the Secretary-General can bring to the attention of the Security Council any matter which may threaten international peace and security, including potential situations of crimes against humanity.[332]

218. In particular, the Office of the Special Adviser on the Prevention of Genocide, located within the Secretariat, is tasked with collecting information on massive and serious violations of human rights and humanitarian law. The Office acts as an early warning system for the Secretary-General and, through him, the Security Council, to address situations that could potentially result in genocide.[333] The Office of the Special Adviser collects information on potential atrocities, often from within the United Nations system, and identifies situations of concern using the Office's Framework of analysis for atrocity crimes,[334] which specifically aims to identify genocide, crimes against humanity and war crimes. The Special Adviser then uses this information to issue statements[335] and brief the Security Council.[336]

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[328] See, for example, General Assembly resolution 48/143 of 20 December 1993 (condemning sexual violence in the former Yugoslavia and affirming that perpetrators of crimes against humanity are individually responsible for such crimes); General Assembly resolution 53/156 of 9 February 1999 (strongly condemning the crimes of genocide and crimes against humanity that were committed in Rwanda in 1994); General Assembly resolution 66/253/B of 3 August 2012 (recalling that the United Nations High Commissioner for Human Rights had stated that violence in Syria may amount to crimes against humanity); and General Assembly resolution 67/262 of 15 May 2013 (recalling statements that crimes against humanity have likely occurred in Syria and expressing concern at incidents of gender-based violence which could amount to crimes against humanity).

[329] See, for example, the letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council (S/1994/1125) (updating the Security Council on conclusions reached by a Commission of Experts on their inquiry into Rwanda, concluding that individuals from both sides of the armed conflict had perpetrated crimes against humanity).

[330] See, for example, the Report of the Secretary-General on the implementation of Security Council resolution 2139 (2014) (S/2014/208) (finding that crimes against humanity were committed in Syria). See also Security Council resolution 2139 of 22 February 2014.

[331] See, for example, the Report of the Secretary-General on the implementation of General Assembly resolution 51/115 of 12 December 1996 (A/52/497).

[332] See Article 99 of the Charter of the United Nations.

[333] See the letter dated 12 July 2004 from the Secrtary-General addressed to the President of the Security Council (S/2004/567).

[334] United Nations, Framework of analysis for atrocity crimes: a tool for prevention (2014), available from www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf.

[335] See, for example, United Nations press release, Statement by Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide, and Jennifer Welsh, Special Adviser of the Secretary-General on the Responsibility to Protect, on the situation in Yarmouk, Syria, 9 April 2015, available from www.un.org/en/preventgenocide/adviser/pdf/9%20April%202015_

219. Subsidiary bodies of the United Nations also monitor the occurrence of crimes against humanity. For example, the Human Rights Council will often receive information from non-governmental organizations (NGOs)[337] or special rapporteurs[338] that identifies potential crimes against humanity. The Human Rights Council may respond to such reports by establishing a commission of inquiry,[339] mandating the Office of the High Commissioner for Human Rights to conduct an investigation into a situation[340] or adopting resolutions.[341] Further, through its

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%20Special%20Advisers'%20statement%20on%20the%20situation%20in%20Yarmouk%20-%20Syria (noting that all parties to the conflict in Syria have reportedly committed grave violations and abuses of human rights that may amount to crimes against humanity). See also United Nations press release, Statement by Adama Dieng, Special Advisor on the Prevention of Genocide and Jennifer Welsh, Special Adviser on the Responsibility to Protect, on the situation in Yemen, 16 February 2016, available from www.un.org/en/preventgenocide/adviser/pdf/2016-02-16%20OSAPG%20Statement%20on %20Yemen%20final.pdf ("Evidence gathered suggests that some of these actions may amount to war crimes and crimes against humanity").

[336] See, for example, the statement of Under-Secretary-General/Special Adviser on the Prevention of Genocide Mr. Adama Dieng to the Meeting of the Security Council in Arria format on Inter-communities Dialogue and prevention of crimes in Central African Republic on 14 March 2014 ("Such widespread and systematic targeting of civilians based on their religion or ethnicity indicates that crimes against humanity are being committed").

[337] See, for example, the joint written statement submitted by CIVICUS: World Alliance for Citizen Participation, a non-governmental organization in general consultative status, the Arab NGO Network for development, a non-governmental organization on the roster (A/HRC/S-15/NGO/1) (urging the Human Rights Council to call upon the Security Council to create a Commission of Inquiry into potential crimes against humanity in Libya); and the written statement submitted by Amnesty International, a non-governmental organization in special consultative status (A/HRC/S-19/NGO/2) (calling on the Human Rights Council to take a strong stand on the crimes against humanity and human rights abuses taking place in Syria, included recommending that the Security Council refer the situation to the Prosecutor of the International Criminal Court).

[338] See, for example, the report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (A/HRC/31/70) (concluding that crimes against humanity continue to occur in the Democratic People's Republic of Korea and stressing the need for a framework on accountability measures for crimes against humanity).

[339] See, for example, Human Rights Council resolution 22/13 of 21 March 2013, on the situation of human rights in the Democratic People's Republic of Korea (A/HRC/RES/22/13) (establishing a Commission of Inquiry into potential human rights violations and crimes against humanity in the Democratic People's Republic of Korea); Human Rights Council resolution S-17/1 of 22 August 2011 on the the situation of human rights in the Syrian Arab Republic (A/HRC/S-17/1) (establishing a Commission of Inquiry into potential human rights violations and crimes against humanity in Syria); and Human Rights Council resolution 22/24 of 20 March 2013 on the situation of human rights in the Syrian Arab Republic (A/HRC/RES/22/24) (same).

[340] See, for example, Human Rights Council resolution 25/1 of 26 March 2014, promoting reconcilliation, accountability and human rights in Sri Lanka (A/HRC/RES/25/1) (requesting that the Office of the High Commissioner monitor the human rights situation in Sri Lanka and undertake a comprehensive investigation into the human rights abuses). See also the comprehensive report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka (A/HRC/30/61) (identifying numerous human rights abuses that occurred in Sri Lanka, including gender-based violence, forced recruitment, torture, enforced disappearance and unlawful killings which may amount to crimes against humanity).

[341] See, for example, Human Rights Council resolution 19/22 of 22 March 2012 on the situation of human rights in the Syrian Arab Republic (A/HRC/RES/19/22) (acknowledging that human rights violations in Syria may amount to crimes against humanity and recommending that the main bodies of the United Nations urgently act to address crimes against humanity that may

universal periodic review, the Council assesses the human rights records of all Member States of the United Nations.[342]

220. Human rights treaty bodies will often identify situations of crimes against humanity and provide recommendations for response, when the crimes against humanity intersect with the subject matter of the treaty. For example, when receiving reports from States parties, the Human Rights Committee addresses violations of the International Covenant for Civil and Political Rights such as violations of the right to life or the right not to be subjected to torture, which include circumstances where those violations rise to the level of crimes against humanity.[343] Thus, while the mandates of the Human Rights Committee and other subsidiary bodies do not specifically include monitoring crimes against humanity, these bodies can identify and recommend appropriate State responses to crimes against humanity.

221. Crimes against humanity are also monitored and addressed through international courts and tribunals. Such crimes were included within the jurisdiction of the International Criminal Court,[344] the International Tribunal for the Former Yugoslavia,[345] the International Tribunal for Rwanda[346] and other special courts and tribunals.[347] Additionally, regional human rights courts identify and speak to crimes against humanity when such crimes intersect with human rights violations under their constitutive instruments,[348] similarly to human rights treaty bodies.

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have been committed); and Human Rights Council resolution 25/25 of 26 March 2014 on the situation of human rights in the Democratic People's Republic of Korea (A/HRC/RES/25/25*) (acknowledging that information received by the Commission of Inquiry provided reasonable grounds to believe that crimes against humanity have been committed and recommends that the General Assembly submit the report of the Commission of Inquiry to the Security Council to consider appropriate international criminal justice mechanisms to ensure perpetrators are held to account).

[342] General Assembly resolution 60/251 of 15 March 2006, para. 5 (*e*).

[343] See, for example, the concluding observations of the Human Rights Committee on the fifth periodic report of Colombia (CCPR/CO/80/COL) (identifying as a subject of concern proposed legislation on alternate penalties to imprisonment and recommending that such legislation does not apply to persons who commited crimes against humanity). See also Decision 2 (66) of the Committee on the Elimination of all Forms of Racial Discrimination on the Situation in Darfur (CERD/C/DEC/SDN/1) (recommending to the Secretary-General, and through him, the Security Council, the enlargement of the African Union force in Darfur with a mandate to protect civilians against crimes against humanity).

[344] See article 5 of the Rome Statute of the International Criminal Court.

[345] See the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (footnote 252 above), article 5.

[346] See the Statute of the International Criminal Tribunal for Rwanda (footnote 253 above), article 3.

[347] See the Special Rapporteur's first report on crimes against humanity (A/CN.4/680 and Corr.1), chapter III, section C.

[348] See A. Huneeus, "International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts", *American Journal of International Law*, vol. 107, No. 1 (January 2013), pp. 1–44, at pp. 14–15 and 18.

B. Potential monitoring mechanisms under a convention

222. There are a range of supplemental monitoring mechanisms that might be considered by States for a convention on the prevention and punishment of crimes against humanity. A particularly useful resource in this regard is the secretariat's 2016 study on information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission on the topic of crimes against humanity.[349] Among other matters, the study surveys institutional structures and procedures under existing treaties,[350] which indicate a range of possible options for States. The following provides a summary of those institutions and procedures.

1. Types of institutions

223. Existing treaties have created different institutional structures to assist in the monitoring of, implementation of and compliance with the relevant treaty. Generally, these structures may be grouped into four categories: (*a*) committees; (*b*) commissions; (*c*) courts; and (*d*) meetings of States parties.[351]

224. First, *committees* typically consist of independent experts who are nationals of the States parties to the treaty and are nominated and elected by States parties.[352] Requirements for committee membership often include high moral standing or character, competence in the field relevant to the treaty and impartiality, which is accomplished by having such experts serve in their personal capacity.[353] Such requirements may also call for equitable geographical distribution, representation of the principal legal systems or balanced gender representation.[354]

225. The specific mandate of a committee varies depending on the instrument. Some instruments will create committees with a general mandate, to consider

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[349] Memorandum prepared by the secretariat on information on existing treaty-based monitoring mechanisms which may be of relevance to the Commission's future work on the topic "Crimes against humanity" (A/CN.4/698).

[350] See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the rights of the child; the International Convention for the Protection of All Persons from Enforced Disappearance; and the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination.

[351] Memorandum prepared by the secretariat (see footnote 349 above), para. 5.

[352] *Ibid.* Committees are established by the following conventions: the International Convention on the Elimination of All Forms of Racial Discrimination, art. 8, para. 1; the International Covenant on Civil and Political Rights, art. 28, para. 2; the Convention on the Elimination of All Forms of Discrimination against Women, art. 17, para. 1; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, para. 1; the Convention on the rights of the child, art. 43, para. 2; the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, art. 27; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 26, para. 2; and the 2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 6.

[353] Memorandum prepared by the secretariat (see footnote 349 above), para. 7.

[354] *Ibid.*

progress made "in the implementation of"[355] or "in achieving the realization of the obligations undertaken in"[356] their respective treaty. Other treaties will list specific functions for the committee, such as: examining reports submitted by States parties;[357] adopting general comments or recommendations;[358] considering individual complaints;[359] assessing inter-State complaints;[360] undertaking inquiries and/or visits;[361] considering urgent action requests;[362] and providing information to an assembly of the States parties.[363] A committee can also have a limited mandate, focused on a single function or on a particular region, such as the Committee Against Torture's Sub-Committee on the Prevention of Torture, which monitors places of detention within States parties,[364] or the International Conference on the Great Lakes Region Committee for the prevention and the punishment of the crime of genocide, war crimes, and crimes against humanity and all forms of discrimination, whose work is limited to the Great Lakes Region of Africa.[365]

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[355] See the Convention on the Elimination of All Forms of Discrimination against Women, article 17, paragraph 1.

[356] See the Convention on the rights of the child, article 43, paragraph 1.

[357] See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, article 9; the International Covenant on Civil and Political Rights, article 40; the Convention on the Elimination of All Forms of Discrimination against Women, article 18; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 19; the Convention on the rights of the child, article 44; and the International Convention for the Protection of All Persons from Enforced Disappearance, article 29.

[358] See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, article 9, paragraph 2; the International Covenant on Civil and Political Rights, article 40, paragraph 4; the Convention on the Elimination of All Forms of Discrimination against Women, article 21; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 19, paragraph 4; and the Convention on the rights of the child, article 45 (d).

[359] See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, article 14; the Optional Protocol to the International Covenant on Civil and Political Rights, article 1; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 22; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 1; the International Convention for the Protection of All Persons from Enforced Disappearance, article 31; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 5.

[360] See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, article 11; the International Covenant on Civil and Political Rights, article 41; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 21; the International Convention for the Protection of All Persons from Enforced Disappearance, article 32; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 12.

[361] See, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 20, paragraph 3; the Optional Protocol to the Convention for the Elimination of All Forms of Discrimination against Women, article 8, paragraph 2; the International Convention for the Protection of All Persons from Enforced Disappearance, article 33; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 13.

[362] See, for example, the International Convention for the Protection of All Persons from Enforced Disappearance, article 30.

[363] *Ibid.*, art. 27.

[364] The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5.

226. Second, *commissions* are typically panels of independent experts, usually elected by States parties for a set number of years.[366] They are sometimes convened with similar functions to committees but are often focused on a particular dispute or type of treaty violation.[367] Commissions can be permanent bodies[368] or may be convened *ad hoc*.[369] The mandate of any given commission varies. For example, *ad hoc* conciliation commissions typically have a limited mandate to resolve inter-State disputes that could not be satisfactorily resolved through negotiation,[370] while other commissions may be called upon only to address alleged breaches of the constitutive treaty.[371] Other commissions have much more general mandates, such as the Inter-American Commission on Human Rights, which has broad "competence with respect to matters relating to the fulfilment of the commitments made by the States Parties".[372]

227. Commissions may also have an obligation periodically to report to an international body. Currently this practice is specific to regional commissions, with the Inter-American Commission on Human Rights reporting to the Organization of American States and the African Commission on Human and Peoples' Rights reporting to the African Union.[373]

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[365] The Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, art. 26, para. 1, and art. 38.

[366] Memorandum prepared by the secretariat (see footnote 349 above), paras. 11–17.

[367] See, for example, the Inter-American Commission on Human Rights, created by the American Convention on Human Rights: "Pact of San José, Costa Rica", article 33; the African Commission on Human and Peoples' Rights, created by the African Charter on Human and Peoples' Rights, article 30; and the International Fact-Finding Commission, created by the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), article 90. Under the Fact-Finding Commission associated with Protocol I, States parties must declare their acceptance of article 90; to date, only 76 of 174 States parties have done so. While that Commission is capable of being operational, it has never been used.

[368] See, for example, the Inter-American Commission on Human Rights; the African Commission on Human and Peoples' Rights; and the International Fact-Finding Commission.

[369] See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, article 12, paragraph 1 (a); and the International Covenant on Civil and Political Rights, article 42, paragraph 1 (a).

[370] Memorandum prepared by the secretariat (see footnote 349 above), para. 19. See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, article 12, paragraph 1 (a); and the International Covenant on Civil and Political Rights, article 42, paragraph 1 (a).

[371] See the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), article 90, paragraph 2 (c).

[372] Memorandum prepared by the secretariat (see footnote 349 above), paras. 20–23, at para. 20. See the American Convention on Human Rights: "Pact of San José, Costa Rica", article 41; and the African Charter on Human and People's Rights, article 45.

[373] Memorandum prepared by the secretariat (see footnote 349 above), para. 24. See also the American Convention on Human Rights: "Pact of San José, Costa Rica", article 41, subparagraph g; and the African Charter on Human and People's Rights, articles 54 and 59, paragraph 3.

228. Third, the treaty may establish a *court*. This is a particular feature of the regional human rights conventions.[374] Such courts are permanent judicial institutions charged with monitoring the conduct of the States parties in the implementation of the treaty.[375] The court typically has jurisdiction over matters relating to the interpretation and application of the treaty establishing the court, though the African Court on Human and Peoples' Rights also extends its jurisdiction to "any other relevant Human Rights instrument ratified by the States concerned".[376] Each court has a different process for cases to be brought before it, with some courts allowing individuals or even NGOs to bring cases,[377] while others limit standing to States parties and the treaty's commission.[378]

229. Fourth, the treaty may establish a *meeting of the States parties*, during which the States parties perform various monitoring functions.[379] Such a meeting might occur on a regular basis,[380] such as annually or biennially, or only when convened by the Secretary-General of the United Nations,[381] by the depositary of the treaty[382] or upon the request of one or more States parties (if then approved by the majority of States parties).[383] Meetings of States parties will generally have broad mandates, such as with the Convention on the Safety of United Nations and Associated Personnel, which gives a mandate "to review the implementation of the Convention, and any problems encountered with regard to its application" (art. 23).[384]

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[374] See the European Convention on Human Rights, article 19; the American Convention on Human Rights: "Pact of San José, Costa Rica", article 33; and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

[375] Memorandum prepared by the secretariat (see footnote 349 above), para. 25.

[376] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 7. See also the European Convention on Human Rights, article 32; and the American Convention on Human Rights: "Pact of San José, Costa Rica", article 62, paragraph 3.

[377] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 5; and the European Convention on Human Rights, art. 34.

[378] See the American Convention on Human Rights: "Pact of San José, Costa Rica", article 61.

[379] Memorandum prepared by the secretariat (see footnote 349 above), paras. 32–33. See, for example, the Convention on the Safety of United Nations and Associated Personnel, article 23; the Rome Statute of the International Criminal Court, article 112; the United Nations Convention against Transnational Organized Crime, article 32; and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), article 7.

[380] See, for example, the Rome Statute of the International Criminal Court, article 112, paragraph 6; and the United Nations Convention against Transnational Organized Crime, article 32.

[381] See, for example, the Convention on the Safety of United Nations and Associated Personnel, article 23.

[382] See, for example, the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), article 7.

[383] See, for example, the Convention on the Safety of United Nations and Associated Personnel, article 23.

[384] See also the Convention on the Safety of United Nations and Associated Personnel, article 23; and the memorandum prepared by the secretariat (see footnote 349 above), paragraphs 35–37.

2. Types of procedures

230. Monitoring mechanisms can entail a range of procedures, including: (*a*) reports by States parties; (*b*) complaints, applications or communications by individuals; (*c*) inter-State complaints; (*d*) inquiries or visits; (*e*) urgent action; and (*f*) presentation of information for meetings of States parties.[385]

231. First, *reports by States parties* may be required on a regular basis by the treaty's committee, commission or other body.[386] Reports will typically include measures undertaken by the State party to implement the treaty, such as the enactment of any necessary national laws and regulations, as well as any difficulties the State is experiencing with respect to implementation or compliance.[387] In response to the report by a State party, the monitoring institution may provide "recommendations" or "comments" to the State party, [388] and in some instances to the United Nations or other international body.[389]

232. Second, treaties also may provide for *complaints, applications or communications by individuals*.[390] Individual complaint mechanisms typically take effect if a State either declares that it recognizes the competence of the respective

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[385] *Ibid.*, para. 38.

[386] *Ibid.*, paras. 39–46. See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, article 9; the International Covenant on Civil and Political Rights, article 40; the American Convention on Human Rights: "Pact of San José, Costa Rica", article 42; the Convention on the Elimination of All Forms of Discrimination against Women, article 18; the African Charter on Human and Peoples' Rights, article 62; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 19; the Inter-American Convention to Prevent and Punish Torture, article 17; the Convention on the rights of the child, article 44; and the International Convention for the Protection of All Persons from Enforced Disappearance, article 29.

[387] *Ibid.*

[388] Memorandum prepared by the secretariat (see footnote 349 above), para. 47. See, for example, the International Covenant on Civil and Political Rights, article 40, paragraph 4; the International Convention for the Elimination of All Forms of Racial Discrimination, article 9, paragraph 2; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 19, paragraph 3; the Convention on the Elimination of All Forms of Discrimination Against Women, article 21, paragraph 1; and the International Convention for the Protection of All Persons from Enforced Disappearance, article 29, paragraph 3.

[389] See, for example, the Convention on the rights of the child, article 45 (b) (the Committee on the Rights of the Child transmits reports of States parties to specialized agencies, the United Nations Children's Fund and other competent bodies, as it considers appropriate).

[390] See the European Convention on Human Rights, article 34; the International Convention on the Elimination of All Forms of Racial Discrimination, article 14; the Optional Protocol to the International Covenant on Civil and Political Rights, articles 1–2; the American Convention on Human Rights: "Pact of San José, Costa Rica", article 44; the African Charter on Human and Peoples' Rights, article 55; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 22; the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, article 5; the Inter-American Convention on the Forced Disappearance of Persons, article XIII; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 2; the International Convention for the Protection of All Persons from Enforced Disappearance, article 31; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 5.

institution to assess individual complaints[391] or signs an optional protocol,[392] but may also be designed to operate without such State action.[393]

233. Depending on the treaty, such complaints may be filed by individuals, groups of persons or non-governmental entities.[394] Typically local remedies must first be exhausted, there must be no local remedy available to provide effective redress or there must be undue delay in the remedial process before an individual complaint can be submitted.[395] Specific monitoring mechanism institutions may also have additional admissibility criteria.[396] Once the relevant body receives an individual

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[391] See the International Convention on the Elimination of All Forms of Racial Discrimination, article 14, paragraph 2; the American Convention on Human Rights: "Pact of San José, Costa Rica", article 44; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 22, paragraph 1; and the International Convention for the Protection of All Persons from Enforced Disappearance, article 31, paragraph 1.

[392] The Optional Protocol to the International Covenant on Civil and Political Rights; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

[393] Memorandum prepared by the secretariat (see footnote 349 above), paras. 49–56.

[394] *Ibid.* See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, article 14, paragraph 2 (permitting complaints from individuals and groups of individuals); the American Convention on Human Rights: "Pact of San José, Costa Rica", article 44 (permitting complaints from any person, group of persons or legally recognized non-governmental entity); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 22, paragraph 1 (permitting complaints from individuals); the Optional Protocol to the International Covenant on Civil and Political Rights, article 1 (permitting complaints from individuals); the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, article 2 (permitting complaints from individuals and groups of individuals); the International Convention for the Protection of All Persons from Enforced Disappearance, article 31, paragraph 1 (permitting complaints from or on behalf of victims); and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 5 (permitting complaints by or on behalf of an individual or group of individuals).

[395] Memorandum prepared by the secretariat (see footnote 349 above), para. 57. See, for example, the European Convention on Human Rights, article 35, paragraph 1; the International Convention on the Elimination of All Forms of Racial Discrimination, article 14, paragraph 7 (a); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 22, paragraph 5 (b); the Optional Protocol to the International Covenant on Civil and Political Rights, articles 2 and 5, paragraph 2 (b); the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, article 4, paragraph 1; the International Convention for the Protection of All Persons from Enforced Disappearance, article 31, paragraph 2 (d); and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 7, paragraph 5.

[396] Memorandum prepared by the secretariat (see footnote 349 above), paras. 58–65. See, for example, the European Convention on Human Rights, article 35 (requiring that the application cannot be anonymous, the matter cannot be substantially the same as another matter addressed by the court, the application cannot be manifestly ill founded and the applicant cannot abuse the right of the individual application); and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 7 (considering communications inadmissible if: "1. The communication is anonymous; 2. The communication is not in writing; 3. The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention and/or the Optional Protocols thereto; 4. The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement; 5. All available

complaint, a procedure will be initiated whereby, ultimately, suggestions, recommendations or views are given by the body to the State party concerned, after which the State may be required to provide a written response, indicating any remedies that it has taken to resolve the situation.[397]

234. Third, the treaty may provide for *inter-State complaints*.[398] Some treaties allow for such complaints with respect to all States parties, while others only permit inter-State complaints if the respondent State has made a declaration accepting such a complaint procedure.[399] Under the International Covenant on Civil and Political Rights and the International Convention for the Elimination of All Forms of Racial Discrimination, if a complaint is not resolved to the satisfaction of the States parties involved, their respective committees will create an *ad hoc* conciliation commission for further proceedings.[400]

235. Fourth, the treaty may establish a process for *inquiries or visits*.[401] For treaties with inquiries, the relevant body can initiate an inquiry upon receipt of reliable information indicating that a serious breach by a State party has occurred.[402] This

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domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief; 6. The communication is manifestly ill-founded or not sufficiently substantiated; 7. The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned, unless those facts continued after that date; 8. The communication is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit").

[397] Memorandum prepared by the secretariat (see footnote 349 above), paras. 66–69 and 71–78.

[398] See, for example, the European Convention on Human Rights, article 33; the International Convention on the Elimination of All Forms of Racial Discrimination, article 11; the International Covenant on Civil and Political Rights, article 41; the American Convention on Human Rights: "Pact of San José, Costa Rica", article 45; the African Charter on Human and Peoples' Rights, article 47; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 21; the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, article 4; the International Convention for the Protection of All Persons from Enforced Disappearance, article 32; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 12.

[399] The International Covenant on Civil and Political Rights, art. 41, para. 1; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 21, para. 1; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, art. 12, para. 1.

[400] See the International Convention on the Elimination of All Forms of Racial Discrimination, article 12, paragraph 1 (a); and the International Covenant on Civil and Political Rights, article 42, paragraph 1 (a).

[401] See the European Convention on Human Rights, article 52; the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), article 90, paragraph 2; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment article 20; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 8; the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 4; the International Convention for the Protection of All Persons from Enforced Disappearance, article 33; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 13.

[402] Memorandum prepared by the secretariat (see footnote 349 above), paras. 88–89. See, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

inquiry may include a visit to the State party if warranted and if the State party agrees.[403] The findings of the inquiry are then transmitted to the State party, along with comments, suggestions or recommendations.[404] Alternatively, the treaty may provide for regular visits to a State party. For example, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishes "a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment" (art. 1).

236. Fifth, the treaty may provide procedures for *urgent action*. However, such a procedure has only been established by the International Convention for the Protection of All Persons from Enforced Disappearance to trace disappeared persons. An urgent action can be initiated via request to the Committee on Enforced Disappearances by relatives of a disappeared person. The urgent action will only be considered by the Committee if the request: (*a*) is not manifestly unfounded; (*b*) does not constitute an abuse of the right of submission; (*c*) has already been duly presented to the competent bodies of the State party concerned; (*d*) is not incompatible with the provisions of the Convention; and (*e*) the same matter is not being examined under another procedure of international investigation (art. 30). The Committee can then transmit recommendations to the State party concerned, which can include a request for the State party to take all necessary measures to locate and protect the person concerned (art. 30, para. 3). The urgent action remains in place "for as long as the fate of the person sought remains unresolved" (art. 30, para. 4).

237. Sixth, and finally, the treaty may provide for a procedure for the *presentation of information to meetings of States parties.*[405] For example, the treaty may allow the treaty's committee or commission to bring a matter to the urgent attention of the States parties (or another international body) in "special cases" where the committee or commission has received one or more communications that reveal widespread or systematic violations of the treaty.[406] That, in turn, may lead to a further study of the situation with findings.[407]

238. In the event that the present draft articles are transformed into a convention on the prevention and punishment of crimes against humanity, there exists a possibility

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Punishment, article 20, paragraph 3; the Optional Protocol to Convention on the Elimination of All Forms of Discrimination Against Women, article 8, paragraph 2; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 13, paragraph 2.

[403] *Ibid.*

[404] See, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 20, paragraph 4; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 8, paragraph 3; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, article 13, paragraph 4.

[405] Memorandum prepared by the secretariat (see footnote 349 above), paras. 105–107.

[406] *Ibid.* See, for example, the African Charter on Human and Peoples' Rights, article 58, paragraph 1; the International Convention for the Protection of All Persons from Enforced Disappearance, article 34; and the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, article 38, paragraph 2 (c).

[407] *Ibid.*

for the selection of one or more of the above mechanisms to supplement existing mechanisms. Such mechanisms might help ensure that States parties fulfil their commitments under the convention, such as with respect to adoption of national laws, pursuing appropriate preventive measures, engaging in prompt and impartial investigations of alleged offenders and complying with their *aut dedere aut judicare* obligation. Selection of a particular mechanism or mechanisms, however, turns less on legal reasoning and more on policy factors, the availability of resources and the relationship of any new mechanism with those that already exist.[408] Further, choices would need to be made with respect to structure: a new monitoring mechanism might be incorporated immediately in a new convention or might be developed at a later stage,[409] such as occurred with the creation of a committee for the International Covenant on Economic, Social and Cultural Rights.[410] Finally, such a monitoring mechanism might be developed in tandem with a monitoring mechanism for the Convention on the Prevention and Punishment of the Crime of Genocide, for which there have been periodic calls.[411]

C. Inter-State dispute settlement

239. This section explores inter-State dispute settlement.[412] The basic methods for peaceful settlement of disputes, of course, are captured in Article 33, paragraph 1, of the Charter of the United Nations, which requires that Member States "shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" for disputes that may endanger international peace and security.[413]

240. There is currently no obligation upon States to resolve inter-State disputes specifically in relation to crimes against humanity. To the extent that such disputes can be resolved, it will occur in the context of a broader obligation for inter-State

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[408] States recently engaged in extensive discussions regarding a possible new mechanism for monitoring compliance with international humanitarian law, which revealed a range of views as to the best means for doing so. See J. Pejic, "Strengthening compliance with IHL: the ICRC–Swiss Initiative", *International Review of the Red Cross* (2016), available from www.cambridge.org/core/journals/international-review-of-the-red-cross/article/div-classtitlestrengthening-compliance-with-ihl-the-icrc-swiss-initiativediv/415157E58381E77C13BBEEC63A85EDC3.

[409] See J. Galbraith, "Treaty options: towards a behavioral understanding of treaty design", *Virginia Journal of International Law*, vol. 53 (2013), pp. 309–364, at p. 341 (empirical and behavioural economics study finding that States are much more willing on average to embrace monitoring mechanisms when they are presented in optional protocols, which are separate documents from the main treaty, than when these commitments are presented in "opt-in" clauses).

[410] See Economic and Social Council resolution 1985/17 of 28 May 1985.

[411] See W. A. Schabas, *Genocide in International Law: the Crime of Crimes*, 2nd ed., Cambridge University Press, 2009, pp. 649–651.

[412] See, generally, C. Gray and B. Kingsbury, "Developments in dispute settlement: Inter-State arbitration since 1945", *British Yearbook of International Law*, vol. 63, No. 1 (1993), pp. 97–134.

[413] See also F. Cede, "The settlement of international disputes by legal means — arbitration and judicial settlement", in J. Bercovitch, V. Kremenyuk and I. W. Zartman (eds.), *The SAGE Handbook of Conflict Resolution*, London, SAGE, 2009, pp. 358–360.

dispute settlement,[414] which may (or may not) include disputes with respect to crimes against humanity.

241. Disputes concerning, *inter alia*, crimes against humanity may also be channelled into a mechanism relating to a different crime, such as genocide or torture, for which there exists a means for inter-State dispute settlement. For example, the claims brought by Bosnia and Hezegovina and by Croatia against Serbia before the International Court of Justice, as well as the counterclaims by Serbia, focused on violation of the obligation to prevent or punish genocide,[415] as there was no treaty providing for the Court's jurisdiction with respect to crimes against humanity. The case brought by Belgium before the Court focused on whether Senegal had violated its obligations to extradite or prosecute Hissène Habré for torture, as, again, there was no treaty providing for the Court's jurisdiction with respect to crimes against humanity.[416] In both these cases, there were also allegations of crimes against humanity.

242. Crimes against humanity have been mentioned in the European Court of Human Rights and the Inter-American Court of Human Rights when evaluating issues such as fair trial rights,[417] *ne bis in idem*,[418] *nullum crimen, nulla poena sine praevia lege poenali*[419] and the legality of amnesty provisions.[420]

243. Treaties addressing crimes in national law often include dispute settlement provisions and, in recent decades, have established an increasingly detailed process

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[414] For example, crimes against humanity arose before the International Court of Justice in the context of counter-claims filed by Italy in the case brought by Germany under the 1957 European Convention for the Peaceful Settlement of Disputes (*Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010*, p. 310, at pp. 311–312, para. 3). In that instance, however, the Court found that since the counterclaims by Italy predated the entry into force of the European Convention on Human Rights, they fell outside the scope of the Court's jurisdiction (*ibid.*, pp. 320–321, para. 30).

[415] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment of 3 February 2015, ICJ, 2015 General List No. 118*, p. 118.

[416] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

[417] *Streletz, Kessler and Krenz* v. *Germany, Application nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2001-II* (concurring opinion of Judge Loucaides); and *K.-H. W.* v. *Germany, Application no. 37201/97, Judgment of 22 March 2001*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2001-II* (concurring opinion of Judge Loucaides).

[418] *Almonacid-Arellano* et al. v. *Chile, Judgment of 26 September 2006*, Inter-American Court of Human Rights, *Series C, No. 154*, p. 62, para. 154.

[419] *Kolk and Kislyiy* v. *Estonia, Application nos. 23052/04 and 24018/04, Decision on admissibility of 17 January 2006*, European Court of Human Rights, *Reports of Judgments and Decisions 2006-I.*

[420] *Barrios Altos* v. *Peru, Judgment of 14 March 2001*, Inter-American Court of Human Rights, *Series C, No. 75*, concurring opinion of Judge Sergio García-Ramírez, para. 13; *Gelman* v. *Uruguay, Judgment of 24 February 2011*, Inter-American Court of Human Rights, *Series C, No. 221*, paras. 198 and 210; and *Marguš* v. *Croatia, Application no. 4455/10, Judgment of 27 May 2014*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2014*, paras. 130–136.

for dispute settlement.[421] For example, article IX of the Convention on the Prevention and Punishment of the Crime of Genocide allows parties to bring a dispute to the International Court of Justice but does not provide for any other dispute settlement process: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[422]

244. Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination provides solely for dispute settlement by the International Court of Justice, although it also makes reference to the possibility of negotiation or of some other mode of settlement. Article 22 reads: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

245. More recent treaties set out a process for dispute settlement that begins with negotiation, then calls for arbitration, and finally resort to the International Court of Justice. For example, article 12, paragraph 1, of the Convention for the suppression of unlawful seizure of aircraft provides:

> Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

246. This language is replicated, either identically or with only minor modifications, in several treaties: the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (art. 13); the International Convention against the taking of hostages (art. 16); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 30); the Convention on the Safety of United Nations and Associated Personnel (art. 22); the International Convention for the Suppression of Terrorist Bombings (art. 20); the International Convention for the Suppression of Financing of Terrorism (art. 24); the United Nations Convention against Transnational Organized Crime (art. 35); the Protocol to Prevent, Suppress and

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[421] Cede (see footnote 413 above), p. 360.

[422] In contrast, the Geneva Conventions for the protection of war victims do not provide for dispute settlement at the International Court of Justice, but do provide for a type of conciliation procedure—by means of Protecting Powers—in the interest of protected persons, "particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention". See, for example, article 11 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I). To date, this procedure has not been used.

Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (art. 15); the United Nations Convention against Corruption (art. 66); and the International Convention for the Protection of All Persons From Enforced Disappearance (art. 42).

247. While there are some alternative possibilities,[423] this multi-step dispute settlement process of negotiation, arbitration and judicial settlement is often used in treaties addressing crimes in national law. Such provisions appear to reflect a belief by States that a dispute settlement process is an important mechanism for helping to ensure compliance with treaty commitments. Even if relatively few cases ultimately are taken to arbitration or filed at the International Court of Justice, the process provides a channel for inter-State negotiation "in the shadow" of a possible resort to arbitration or judicial settlement. Each of these steps — negotiation, arbitration and judicial settlement — is discussed briefly below.

1. Negotiation

248. The antecedent requirement that there be negotiations prior to resort to inter-State compulsory dispute settlement is commonly included in inter-State dispute settlement provisions. Such provisions, however, do not usually specify what exactly it means when a dispute "cannot be settled by negotiation". The *travaux préparatoires* of the United Nations Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime indicates that such a provision "is to be understood in a broad sense to indicate an encouragement to States to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies".[424]

249. In *Mavrommatis*, the Permanent Court of International Justice held that the requirement for negotiation prior to resort to compulsory dispute settlement was intended to ensure that the respondent party simply had notice of the impending

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[423] For example, the OAU Convention on the Prevention and Combating of Terrorism does not require that States submit a dispute to arbitration prior to referring a case to the International Court of Justice. The Convention provides that, after negotiation, a State party to the dispute can elect to submit the case either to arbitration or to the International Court of Justice (art. 22). The ASEAN Convention on Counter Terrorism provides for dispute settlement through consultation, negotiation or "any other peaceful means" (art. XIX). Further, treaties establishing international criminal tribunals may have alternative methods of dispute settlement given the existence of institutional mechanisms. See, for example, the Rome Statute of the International Criminal Court, article 119 ("1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. 2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court").

[424] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Official Records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime, Tenth session* (A/AC.254/33), para. 34.

case before it was filed.[425] The International Court of Justice reached a similar conclusion in the *South West Africa* cases, where it held that the duty to negotiate can be met even when no direct or formalized negotiations have taken place.[426] In more recent cases, however, the Court has indicated that the applicant State must make a good faith effort to resolve the dispute through negotiation. For example, in *Armed Activities on the Territory of Congo*, the Court distinguished between merely providing notice of an impending case and engaging in actual good faith negotiations with the intent of resolving the dispute.[427] In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court stated:

> In determining what constitutes negotiations, the Court observes that negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of "negotiations" differs from the concept of "dispute", and requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.[428]

250. The Court maintained that fulfilment of this step does not mean that States must settle their dispute through negotiation, but that they must negotiate until they reach a deadlock or a stage where further negotiations would be futile.[429]

251. In addition, most treaties do not specify the amount of time required for negotiations prior to resort to inter-State compulsory dispute settlement.[430] In some

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[425] *Mavrommatis Palestine Concessions; Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, pp. 13–15 ("[This rule] recognises, in fact, that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations. ... When negotiations between the private person and the authorities have already—as in the present case—defined all the points at issue between the two Governments, it would be incompatible with the flexibility which should characterise international relations to require the two Governments to reopen a discussion which has in fact already taken place and on which they rely" (*ibid.*, p. 15)).

[426] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962*, p. 319, at p. 346 ("[N]o such direct negotiations have ever been undertaken by [the parties]. But in this respect it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties").

[427] *Armed Activities on Territory of Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at pp. 40–41, para. 91 (despite various protests by the Democratic Republic of the Congo with respect to the actions of Rwanda, made both directly to Rwanda and within international organizations, the Court held there was insufficient evidence that the Democratic Republic of the Congo sought to commence negotiations).

[428] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 132, para. 157.

[429] *Ibid.*, pp. 132–133, para. 158.

cases, the relevant provision may indicate that disputes which "cannot be settled through negotiation within a reasonable time" may be referred to compulsory dispute settlement,[431] or indicate that a specific period of time for negotiations must have passed, although this is not common with respect to treaties addressing crimes at the national level.[432]

2. Arbitration

252. As indicated above in paragraph 246, the Convention for the suppression of unlawful seizure of aircraft, at article 12, paragraph 1, provides that a dispute "which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration", and "[i]f within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to" judicial settlement. Such a provision provides considerable flexibility to the States in the formation of the arbitral tribunal and its procedures. While further detail might be provided in the provision with respect to those matters, including designation of an appointing authority and a registry, the approach taken in treaties addressing crimes under national law is not to do so. Instead, if an arbitral process is not organized within a set period of time, either State party may resort to judicial settlement.

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[430] Article 12, paragraph 1, of the Convention for the suppression of unlawful seizure of aircraft reads, in relevant part: "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiations, shall, at the request of one of them, be submitted to arbitration." See also the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, article 13 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft); the International Convention against the taking of hostages, article 16 (almost identical language); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 30 (almost identical language); and the International Convention for the Protection of All Persons from Enforced Disappearance, article 42 (almost identical language).

[431] Article 20, paragraph 1, of the International Convention for the Suppression of Terrorist Bombings reads, in relevant part: "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration." See also the International Convention for the Suppression of the Financing of Terrorism, article 24 (identical language to the International Convention for the Suppression of Terrorist Bombings); the United Nations Convention against Transnational Organized Crime, article 35 (almost identical language to the International Convention for the Suppression of Terrorist Bombings); the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime article 15 (almost identical language); and the United Nations Convention against Corruption, article 66 (almost identical language).

[432] See the Rome Statute of the International Criminal Court, article 119, paragraph 2, in relevant part ("Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly or States Parties").

253. Under the Convention for the suppression of unlawful seizure of aircraft, and most other treaties addressing crimes in national law, the amount of time during which arbitration must first be pursued is six months.[433]

254. In *Questions Relating to the Obligation to Prosecute or Extradite*, the International Court of Justice found that a State party can satisfy the requirement to submit a dispute to arbitration by attempting to resort to arbitration, even if the other party refuses to respond.[434] The Court held that the requirement to submit the case to arbitration was complied with when "[a] direct request to resort to arbitration was made by Belgium in a Note Verbale of 20 June 2006", in which Belgium stated that "the attempted negotiation with Senegal, which started in November 2005, ha[d] not succeeded" and referenced its obligations under article 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[435] After Senegal did not respond, Belgium sent a Note Verbale on 8 May 2007, which reiterated "its wish to constitute an arbitral tribunal" and noted that they had "received no response from the Republic of Senegal on the issue of this proposal of arbitration".[436] The Court concluded that "[t]he present case is one in which the inability of the Parties to agree on the organization of the arbitration results from the absence of any response on the part of the State to which the request for arbitration was addressed", given that the request for arbitration was filed over two years before the case was brought before the Court, the requirement to submit the case to arbitration was met.[437]

3. Judicial settlement

255. The judicial settlement provision in article 12, paragraph 1, of the Convention for the suppression of unlawful seizure of aircraft allows States to refer a dispute to the International Court of Justice, "by request in conformity with the Statute of the

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[433] Article 12, paragraph 1, reads, in relevant part: "If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court." See also the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, article 13 (identical language); the International Convention against the taking of hostages, article 16 (identical language); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 30, paragraph 1 (identical language); the Convention on the Safety of United Nations and Associated Personnel, article 22, paragraph 1 (almost identical language); the International Convention for the Suppression of Terrorist Bombings, article 20 (almost identical language); the International Convention for the Suppression of the Financing of Terrorism, article 24 (almost identical language); the United Nations Convention against Transnational Organized Crime, article 35 (almost identical language); the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, article 15 (almost identical language); the United Nations Convention against Corruption, article 66 (almost identical language); and the International Convention for the Protection of All Persons from Enforced Disappearance, article 42 (identical language).

[434] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 416 above), p. 448, para. 62.

[435] *Ibid.*, p. 447, para. 60 (quoting the Note Verbale of 20 June 2006).

[436] *Ibid.* (quoting the Note Verbale of 8 May 2007).

[437] *Ibid.*, p. 448, para. 61.

Court", when a dispute arises and the parties are unable to agree on the organization of the arbitration.

256. Article 36, paragraph 1, of the Statute of the International Court of Justice provides that the jurisdiction of the Court "comprises … all matters specially provided for … in treaties and conventions in force". The Court's jurisdiction often has been invoked on the basis of a compromissory clause contained in a treaty or convention.[438]

4. Opting out of inter-State dispute settlement

257. While most treaties addressing crimes under national law provide for inter-State dispute settlement, they also typically allow a State party to opt out of such dispute settlement.[439] For example, article 12, paragraph 2, of the Convention for the suppression of unlawful seizure of aircraft provides that "[e]ach State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation".

258. Equivalent clauses, allowing a State party to opt out of the entire dispute settlement mechanism, are contained in several other treaties addressing crimes under national law, including: the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[440] the International Convention against the taking of hostages;[441] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[442] the Convention on the Safety of United Nations and Associated Personnel;[443] the International Convention for the Suppression of Terrorist Bombings;[444] the International Convention of the Suppression of the Financing of Terrorism;[445] and

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[438] For a list of treaties or conventions in force conferring jurisdiction upon the Court, either directly or through reference to the Permanent Court of Justice, see www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4.

[439] An alternative approach would be to allow States to opt into inter-State dispute settlement, but that approach tends to result in lower exposure to compulsory dispute settlement. See Galbraith (footnote 409 above), p. 330 (empirical and behavioural economics study finding that when States have the right to opt out of the jurisdiction of the International Court of Justice, 80 per cent do not do so, whereas if States have the right to opt into such jurisdiction, only 5 per cent do so).

[440] Art. 13, para. 2 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[441] Art. 16, para. 2 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[442] Art. 30, para. 2 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[443] Art. 22, para. 2 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[444] Art. 20, para. 2 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[445] Art. 24, para. 2 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

the International Convention for the Protection of All Persons from Enforced Disappearance.[446]

259. In some recent treaties, however, the State party is only able to opt out of the portion of the dispute settlement mechanism that relates to arbitration and judicial settlement, not the portion relating to negotiation. Thus, article 66 of the United Nations Convention against Corruption only allows a State party to opt out of paragraph 2, containing the provisions on arbitration and judicial settlement. The provision on negotiation is separately included in paragraph 1:

> 1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.
>
> 2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
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> 3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.
>
> 4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

260. This approach was first adopted in article 35 of the United Nations Convention against Transnational Organized Crime[447] and article 15 of its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, which contains identical language. Although the term "reservation" is used in paragraphs 3 and 4, the term "declaration" would also appear appropriate in this context.[448]

261. As of January 2017, there are 181 States parties to the United Nations Convention against Corruption. Of those, 42 States parties have filed a reservation

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[446] Art. 42, para. 2 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[447] Art. 35 (identical language to the United Nations Convention against Corruption).

[448] See, for example, the International Convention for the Protection of All Persons from Enforced Disappearance, article 42, paragraphs 2 and 3 ("2. A State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a declaration. 3. Any State Party having made a declaration in accordance with the provisions of paragraph 2 of this article may at any time withdraw this declaration by notification to the Secretary-General of the United Nations").

declaring that they do not consider themselves bound by paragraph 2 of article 66.[449] Similarly, there are 187 States parties to the United Nations Convention against Transnational Organized Crime. Of those, 43 States parties have made a reservation declaring that they do not consider themselves bound by paragraph 2 of article 35 of that Convention.[450]

D. Draft article 17. Inter-State dispute settlement

262. As outlined in the first section of this chapter, there is a variety of existing monitoring mechanisms that are used to address situations of crimes against humanity. In the event that the draft articles on crimes against humanity are transformed into a convention on the prevention and punishment of crimes against humanity, there also exists a possibility for the selection of one or more mechanisms to supplement existing mechanisms, but that selection would turn less on legal considerations and more on policy factors and the availability of resources. Moreover, some or all of such mechanisms might be optional and might be included in a supplemental protocol rather than in the convention itself. As such, no proposal is made in this report with respect to the selection of one or more new mechanisms.

263. As outlined above in the previous section, however, treaties addressing crimes in national law commonly include a provision for inter-State dispute settlement in the form of negotiation, arbitration and judicial settlement of a dispute concerning the interpretation or application of the treaty.[451] Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 17. Inter-State dispute settlement

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiation.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States, be submitted to arbitration. If, six months after the date of the request for arbitration, those States are unable to agree on the organization of the arbitration, any one of those States may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State may, at the time of signature, ratification, acceptance or approval of or accession to the present draft articles, declare that it does not

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[449] The European Community filed a declaration to article 66, paragraph 2, stating: "With respect to Article 66, paragraph 2, the Community points out that, according to Article 34, paragraph 1, of the Statute of the International Court of Justice, only States may be parties before that Court. Therefore, under Article 66, paragraph 2, of the Convention, in disputes involving the Community, only dispute settlement by way of arbitration will be available."

[450] The European Community also filed a statement to article 35: "With respect to Article 35, paragraph 2, the Community points out that, according to Article 34, paragraph 1, of the Statute of the International Court of Justice, only States may be parties before that Court. Therefore, under Article 35, paragraph 2, of the Convention, in disputes involving the community only dispute settlement by way of arbitration will be available."

[451] See, generally, Gray and Kingsbury (footnote 412 above).

consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

Chapter VIII
Remaining issues

264. This chapter addresses other issues that have arisen in the course of discussions within the Commission relating to this topic: concealment of crimes against humanity; immunity; and amnesty.

A. Concealment of crimes against humanity

265. During the course of the sixty-eighth session, it was suggested within the Commission that the present draft articles might include, in some fashion, an express obligation upon States to take necessary measures to criminalize "concealment" of a crime against humanity.[452] In other words, States might be obligated to criminalize an "after-the-fact" act of concealing one of the offences currently identified in draft article 5, even if an individual was not involved in the offences him or herself. Some members expressed a view, however, that inclusion of concealment was not appropriate, while others stated that concealment was already implicitly included in draft article 5, namely draft article 5, paragraph 2 (*c*).

266. Most treaties addressing crimes do not address, at least expressly, the criminalization of "concealment" of a crime. Thus, no provision on concealment appears in: the International Convention on the Suppression and Punishment of the Crime of *Apartheid*; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; the International Convention against the taking of hostages; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention for the Suppression of Terrorist Bombings; and the International Convention for the Suppression of the Financing of Terrorism.

267. Only a few global treaties on crimes address criminalization of "concealment" as such and do so in the form of a provision relating to concealment of *property* rather than concealment of the crime itself. Article 24 of the United Nations Convention against Corruption provides:

> Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

268. Under article 24, States are encouraged ("shall consider adopting"), but are not obligated, to take measures to criminalize the "concealment" of "property" that "is the result of" any of the offences established by the Convention. Further, article 24, by its terms, speaks of concealment that is (*a*) intentional, (*b*) committed after one

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[452] See the provisional summary record of the 3297th meeting of the International Law Commission on 12 May 2016 (A/CN.4/SR.3297).

of the other offences established by the Convention has been committed, and (*c*) committed by a person who did not participate in such other offence.[453]

269. Article 23 of the United Nations Convention against Corruption also obligates States parties to take measures criminalizing the laundering of the proceeds of a crime of corruption, which is also a form of concealment.[454] A few other treaties on crimes at the global and regional levels also address concealment in the context of the laundering of proceeds of crime. For example, in the United Nations Convention against Transnational Organized Crime, article 6, paragraph 1, on "Criminalization of the laundering of proceeds of crime" states, in part:

> Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a)(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
>
> (a)(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.

270. Similar articles may be found in: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3); the Inter-American Convention against Corruption;[455] the 2001 Southern African Development Community Protocol against Corruption;[456] and the African Union Convention on Preventing and Combating Corruption.[457] None of these conventions address concealment of the offence itself, but instead confine their scope to concealment of proceeds from the offence.

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[453] See the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 35 above), p. 87, para. 313.

[454] Art. 23 ("Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: … (a)(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime").

[455] Art. VI, para. 1 ("This Convention is applicable to the following acts of corruption: … d. The fraudulent use or concealment of property derived from any of the acts referred to in this article").

[456] Art. 3 ("This Protocol is applicable to the following acts of corruption: … g) the fraudulent use or concealment of property derived from any of the acts referred to in this Article").

[457] Article 4, in relevant part ("This Convention is applicable to the following acts of corruption and related offences: … (h) the use or concealment of proceeds derived from any of the acts referred to in this Article") and article 6, in relevant part ("State Parties shall adopt such legislative and other measures as may be necessary to establish as criminal offences: … b) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences").

271. The Council of Europe's Criminal Law Convention on Corruption includes an article that addresses concealment in the context of "account offences" (art. 14), meaning offences such as creating an invoice with false or incomplete information or unlawfully omitting the record of a payment. This article obligates States to adopt legislative and other measures to establish certain account offences as "offences liable to criminal or other sanctions" when these offences are committed in order to "commit, conceal or disguise the offences referred to in [the Convention]" (art. 14).

272. The International Convention for the Protection of All Persons from Enforced Disappearance addresses concealment in two ways. First, the definition of "enforced disappearance" requires an act of depriving someone of his or her liberty "followed by a refusal to acknowledge the deprivation of liberty *or by concealment of the fate or whereabouts of the disappeared person**" (art. 2). Second, the Convention addresses concealment in the context of the falsification, concealment or destruction of documents attesting to the true identity of a child who is subject to enforced disappearance, whose father, mother or guardian was subjected to enforced disappearance, or who was born during the captivity of a mother subjected to enforced disappearance (art. 25, para. 1). Hence, the Convention does not include any provisions addressing generally the concealment of evidence that a crime occurred.

273. The United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption both include an article on overall obstruction of justice. Article 25 of the United Nations Convention against Corruption reads:

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;
>
> (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.[458]

274. This article obligates States to establish two acts as criminal offences under national law, namely efforts to influence witnesses or the production of evidence and any interference with the exercise of judicial or law enforcement officials.[459] The protection of witnesses and other individuals who participate in an investigation or criminal proceeding was addressed in chapter IV, subsection A, and in proposed draft article 14, paragraph 1. Regarding interference with the actions of judicial or

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* Emphasis added.

[458] See also the United Nations Convention against Transnational Organized Crime, article 23 (almost identical language).

[459] See the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (footnote 35 above), pp. 75–76, paras. 255–260.

law enforcement officers, there appear to be no other global treaties on crimes that address this other than the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption.

275. While global treaties on crimes typically do not address "concealment" of a crime as such, the issue has been considered during negotiations. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, under article 4, paragraph 1, obligates States parties to make torture a crime under their national law, including an act "which constitutes complicity or participation in torture". When the Working Group tasked with drafting the Convention first proposed this text, some representatives questioned if "complicity or participation in torture" would "cover those persons who were accessories to the crime of torture after it had occurred or who had in some way concealed acts of torture".[460] Some speakers stated that, under their national legal systems, the term "complicity" encompassed persons who were an accomplice to the crime after the fact or engaged in concealing that a crime occurred, while others felt that the additional text was necessary. The English text of article 4 was not changed[461] but the Working Group proposed that the Spanish text of draft article 4, paragraph 1, be written to include the phrase *o encubrimiento de la tortura* ("concealment of torture").[462] Ultimately, however, the equally authentic Spanish text of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also contained no such language, referring instead in article 4, paragraph 1, to an act by any person which *constituya complicidad o participación en la tortura* ("constitutes complicity or participation in torture").

276. There was a similar debate within the Commission as to whether the proposed articles on individual responsibility in the draft code of crimes against the peace and security of mankind should incorporate the concept of an "attempt to conceal a crime".[463] Several members stated that concealment of a crime was not as serious as the commission of a crime and should not be viewed as meriting comparable treatment. Further, uncertainty was expressed as to what exactly was meant by "concealment", such as whether a government's unwillingness to release information might constitute "concealment". Ultimately, the Commission decided not to include express language on concealment in article 2 of the draft code.

277. Bearing these considerations in mind, the Special Rapporteur is of the view that the Commission should follow existing practice by not including a provision on "concealment" of a crime against humanity in these draft articles. Most treaties addressing crimes do not seek to single out, as a separate offence, "concealment" of the crime, leaving that instead to the operation of national laws as they currently

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[460] Nowak and McArthur (see footnote 67 above), p. 232; and United Nations Economic and Social Council, Report of the Working Group on a draft convention against torture and other cruel, inhuman or degrading treatment or punishment (E/CN.4/1367), para. 34.

[461] Nowak and McArthur (see footnote 67 above), p. 232; and the Report of the Working Group on a draft convention against torture and other cruel, inhuman or degrading treatment or punishment (see footnote above), para. 35.

[462] *Ibid.*, para. 36.

[463] See *Yearbook ... 1996*, vol. I, 2437th meeting, pp. 38–39, paras. 59–60; see also *ibid.*, p. 40, paras. 76–77, and 2438th meeting, pp. 42–43, paras. 1–17.

exist.[464] When concealment is addressed, it typically concerns concealment of property or proceeds of the crime, not concealment of the crime itself.

B. Immunity

278. When prosecutions occur under national law of persons alleged to have committed crimes against humanity, it is possible that the alleged offender will assert that he or she is immune under international law from national jurisdiction. When this occurs, an immunity existing under customary or conventional international law may prevent a State from exercising its national criminal jurisdiction over a foreign State's official. Indeed, some international conventions provide detailed rules for certain classes of State officials, including diplomats,[465] consular officials,[466] those participating in special missions[467] and officials of international organizations.[468]

279. At its fifty-ninth session in 2007, the Commission decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its work programme.[469] The Commission appointed Mr. Roman A. Kolodkin as Special Rapporteur,[470] and requested the secretariat to prepare a background study on the topic[471] which the secretariat produced in 2008.[472] Mr. Kolodkin submitted three reports, which the Commission received and considered at its sixtieth session in 2008[473] and its sixty-third session in 2011.[474] Those reports did not include draft articles.[475]

280. In 2012, Ms. Concepción Escobar Hernández replaced Mr. Kolodkin as Special Rapporteur, as Mr. Kolodkin was no longer a member of the Commission at that time. The Commission received and considered the preliminary report of the

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[464] For example, the United Kingdom International Criminal Court Act, 2001 c.17, which was enacted to implement the Rome Statute of the International Criminal Court, includes as an ancillary offence under section 55, paragraph (1) (d), "assisting an offender or concealing the commission of an offence". Section 55, paragraph (5) (b), provides that "the reference to concealing an offence is to conduct that in relation to an arrestable offence would amount to an offence under section 5(1) of [the Criminal Law Act 1967]". An accompanying explanatory note indicates: "This section defines ancillary offences for the purposes of this Part. They include the forms of secondary liability in Article 25.3 of the [Rome Statute of the International Criminal Court] but are defined in terms of the principles of secondary liability under the law of England and Wales." The United Kingdom statute and explanatory note are available from www.legislation.gov.uk/ukpga/2001/17/contents.

[465] Vienna Convention on Diplomatic Relations.

[466] Vienna Convention on Consular Relations.

[467] Convention on special missions.

[468] See, for example, the Convention on the Privileges and Immunities of the United Nations.

[469] *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 376.

[470] *Ibid.*

[471] *Ibid.*, p. 101, para. 386.

[472] Memorandum by the secretariat on "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/596 and Corr. 1).

[473] *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601, p. 157 (preliminary report).

[474] The second report is available as document A/CN.4/631 and the third report is available as document A/CN.4/646, from the Commission's website (documents of the sixth-third session).

[475] *Ibid.*

Special Rapporteur at the same session in 2012,[476] her second report during the sixty-fifth session in 2013,[477] her third report during the sixty-sixth session in 2014,[478] her fourth report during the sixty-seventh session in 2015[479] and her fifth report during the sixty-eighth session in 2016.[480] On the basis of the draft articles proposed by the Special Rapporteur in the second, third, and fourth reports, the Commission has provisionally adopted five draft articles and commentaries thereto.[481] It is noted that these draft articles do not address immunities that exist under "special rules of international law", such as those on the immunity of diplomats, consular officials, persons on special mission or officials of international organizations.[482] The Commission's work on this topic is ongoing.

281. Treaties addressing crimes typically do not contain a provision on the issue of immunity, leaving the matter to other treaties addressing immunities of classes of officials or to customary international law. Thus, there is no provision on immunity of State officials or officials of international organizations in: the Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions for the protection of war victims; the Convention for the suppression of unlawful seizure of aircraft; the Convention for the suppression of unlawful acts against the safety of civil aviation; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; the International Convention on the Suppression and Punishment of the Crime of *Apartheid*; the International Convention against the taking of hostages; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1985 Inter-American Convention to Prevent and Punish Torture; the International Convention for the Suppression of Terrorist Bombings; the International Convention for the Suppression of the Financing of Terrorism; and the United Nations Convention against Transnational Organized Crime.[483] Some treaties provide that State officials have international criminal responsibility or shall be punished, but do not preclude procedural immunities in national courts.[484]

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[476] A/CN.4/654; available from the Commission's website (documents of the sixty-fourth session).

[477] A/CN.4/661; available from the Commission's website (documents of the sixty-fifth session).

[478] A/CN.4/673; available from the Commission's website (documents of the sixty-sixth session).

[479] A/CN.4/686; available from the Commission's website (documents of the sixty-seventh session).

[480] A/CN.4/701; available from the Commission's website (documents of the sixty-eighth session).

[481] Draft article 2 on the use of terms is still a developing text.

[482] Draft article 1, paragraph 2, provides: "The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State."

[483] Article 26, paragraph 3, of this Convention does address immunity from prosecution of a person who cooperates with law enforcement authorities in the investigation or prosecution of Convention offences ("Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention").

[484] See, for example, the Convention on the Prevention and Punishment of the Crime of Genocide, article IV (individuals "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals"); and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, article III ("[i]nternational criminal responsibility shall apply . . . to . . . representatives of the State, whether residing in the territory of the State

282. There is a provision on immunity in the Inter-American Convention on Forced Disappearance of Persons,[485] but that provision was not reproduced in the International Convention for the Protection of All Persons from Enforced Disappearance. Indeed, while an initial draft of what became the International Convention for the Protection of All Persons from Enforced Disappearance contained an article explicitly excluding immunity of State officials other than diplomats,[486] States decided to drop that article in the final version of the Convention.[487] There is also a provision on immunity in the United Nations Convention against Corruption,[488] but that provision is focused on the immunity of a State official within his or her own country, not on the immunity of a State official from foreign criminal jurisdiction.

283. Treaties establishing international courts and tribunals typically abrogate immunities of State officials, out of a belief that concerns with respect to prosecutions at the national level are not warranted before courts and tribunals consisting of international prosecutors and judges. Building upon the text of the Agreement for the prosecution and punishment of the major war criminals of the European Axis, Charter of the International Military Tribunal ("Nürnberg Charter") and statutes of the *ad hoc* tribunals, article 27, paragraph 2, of the Rome Statute of the International Criminal Court provides that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". To the extent that the issue arises, international criminal tribunals seem to recognize the difference between prosecutions before international jurisdictions and national jurisdictions, such as by noting that "national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action", whereas such a risk "does not arise with international courts and tribunals, which are 'totally independent of states and subject to strict rules of impartiality'".[489]

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in which the acts are perpetrated or in some other State"). Whatever effects may exist under the Convention for the Prevention and Punishment of the Crime of Genocide with respect to immunity, article VI limits jurisdiction over the crime to "the State in the territory of which the act was committed" and "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

[485] Article IX reads, in relevant part: "Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations."

[486] The initial draft was prepared by the Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights. See the Report of the sessional working group on the administration of justice (footnote 175 above), article 10, paragraph 2 ("No privileges, immunities or special exemptions shall be granted in such trials, subject to the provisions of the Vienna Convention on Diplomatic Relations").

[487] The Convention does address immunities in the context of granting them to the members of that treaty's committee of experts; see article 26, paragraph 8, of the Convention.

[488] Art. 30, para. 2 ("Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention").

[489] *Prosecutor* v. *Al Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the*

284. Consistent with the approach taken in prior treaties addressing crimes, the Special Rapporteur is of the view that the draft articles on crimes against humanity should not address the issue of immunity of State officials or officials of international organizations, and instead should leave the matter to be addressed by treaties on immunities for particular classes of officials and by customary international law. This approach should not be construed as having any implications for the Commission's work on "Immunity of State officials from foreign criminal jurisdiction".

C. Amnesty

285. When prosecutions occur under national law of persons alleged to have committed crimes against humanity, it is also possible that the alleged offender will assert that he or she is protected by an amnesty granted by his or her State of nationality. An amnesty refers to legal measures that have the effect of prospectively barring criminal prosecution and, in some cases, civil action against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption. It may also refer to legal measures that retroactively nullify legal liability that was previously established.[490] Amnesties accorded under national law by a State in which crimes have occurred may arise pursuant to constitutional, statutory or executive sources of law, and may be the product of a negotiated peace agreement ending an armed conflict. Such an amnesty may be general in nature or may be conditioned by certain requirements, such as disarmament of a non-State actor group, a willingness of an alleged offender to testify in public to the crimes committed or an expression of apology to the victims or their families by the alleged offender.

286. Conflicting views exist as to the permissibility of amnesties under international law, including with respect to crimes against humanity. With respect to treaties, "[n]o international treaty explicitly prohibits amnesties",[491] including: the Convention on the Prevention and Punishment of the Crime of Genocide; the Geneva Conventions for the protection of war victims; the International Convention on the Suppression and Punishment of the Crime of *Apartheid*; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; or the Inter-American Convention to Prevent and Punish Torture.

287. To the contrary, article 6, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), which has 168 States parties,

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Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, Pre-Trial Chamber I, International Criminal Court, para. 34 (citing A. Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, 2008, p. 312).

[490] Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (HR/PUB/09/1), available from www.ohchr.org/Documents/Publications/Amnesties_en.pdf, p. 5. This report distinguishes between amnesties, pardons, official immunities and other elements of impunity.

[491] See *the Belfast Guidelines on Amnesty and Accountability*, University of Ulster and Transitional Justice Initiative, 2013, available from www.ulster.ac.uk/__data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf, guideline 6 b).

encourages States to enact amnesties at the end of hostilities. It reads: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." The 2005 study on *Customary International Humanitarian Law* published under the auspices of the ICRC interprets article 6, paragraph 5, as excluding persons suspected of, accused of or sentenced for war crimes, concluding that State practice established this as a norm of customary international law applicable in non-international armed conflicts.[492] That interpretation, however, has been criticized.[493]

288. Recently negotiated treaties also have not precluded amnesties, including treaties addressing serious crimes. Thus, the possibility of including a provision on amnesty was debated during the negotiations for both the Rome Statute of the International Criminal Court and the International Convention for the Protection of All Persons from Enforced Disappearance, but the issue proved controversial and the final treaties excluded any such provision.[494]

289. Many treaties that address crimes at the national level impose an obligation on States parties to submit certain offences to prosecution (unless the person is extradited or surrendered to another authority capable of doing so) and sometimes obligate States parties to provide victims with reparations (see chapter IV, section D above). Some commentators,[495] treaty bodies[496] and courts[497] have found that such

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[492] See J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, 2005, rule 159 ("At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes").

[493] See, for example, *the Belfast Guidelines on Amnesty and Accountability* (footnote 491 above), p. 41 ("The limited evidence cited … seems to contradict the ICRC's justification for reformulating Article 6(5)").

[494] See *the Belfast Guidelines on Amnesty and Accountability* (footnote 491 above), p. 36; Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (footnote 44 above), paras. 73–80; J. Gavron, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *The International and Comparative Law Quarterly*, vol. 51, No. 1 (January 2002), pp. 91–117, at pp. 107–108; and *Marguš* v. *Croatia* (footnote 420 above), para. 109.

[495] See, for example, Cassese *et al.* (footnote 234 above), p. 310.

[496] See, for example, general comment No. 20 (footnote 145 above), paragraph 15, in which the Human Rights Committee concluded that amnesty laws were incompatible with article 7 of the International Covenant on Civil and Political Rights prohibiting torture and other cruel, inhuman or degrading treatment of punishment ("The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible").

[497] See, for example, *Ould Dah* v. *France, Application no. 13113/03, Decision of 17 March 2009*, Fifth Section, European Court of Human Rights, *Reports of Judgments and Decisions 2009*-I, p. 438; *Barrios Altos* v. *Peru* (footnote 420 above), paras. 41–44; and *Decision on Ieng Sary's Appeal against the Closing Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), 11 April*

provisions implicitly preclude amnesties. It is noted, however, that such treaties do not require prosecution; they require that the matter be submitted to prosecution, which leaves intact prosecutorial discretion. Further, such treaties typically provide that when the offence is submitted to prosecution, the national authorities shall decide whether to prosecute in a similar manner as they would for ordinary offences of a serious nature.[498]

290. With respect to State practice, amnesties historically have been adopted by various States, even for serious crimes. For example, the 1999 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone provided for a blanket amnesty. Article IX, paragraph 2, read: "After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement."[499] At the same time, the Special Representative of the Secretary-General for Sierra Leone attached a disclaimer to the agreement stating that "the amnesty provision contained in article IX of the Agreement ('absolute and free pardon') shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law".[500]

291. In considering the effect of an amnesty, a distinction might be drawn between the ability of an amnesty to affect a prosecution in the State where the amnesty was issued, and its ability to affect a prosecution before the courts of other States or a prosecution before an international or "hybrid" court. With respect to prosecution before the courts of other States, it is generally accepted that the granting of amnesty by one State has no direct effect on prosecutions in a different State.[501]

2011, Extraordinary Chambers in the Courts of Cambodia, paragraph 201.

[498] See the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 7, paragraph 2 ("These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1"); and the International Convention for the Protection of All Persons from Enforced Disappearance, article 11, paragraph 2 ("These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1").

[499] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed in Lomé on 7 July 1999, available from www.usip.org/sites/default/files/file/resources/collections/peace_agreements/sierra_leone_07071999.pdf.

[500] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone (S/2000/915), para. 23; see also *Rule-of-Law Tools for Post-Conflict States: Amnesties* (footnote 490 above), p. 11.

[501] See *the Belfast Guidelines on Amnesty and Accountability* (footnote 491 above), guideline 18 a) ("Although amnesties bar criminal proceedings within the states that enacted the amnesty, they cannot bar international, hybrid or foreign courts from exercising jurisdiction. Such courts may decide under their own jurisdiction whether to recognise an amnesty"). See also R. O'Keefe, *International Criminal Law*, Oxford University Press, 2015, p. 477; and *Ould Dah* v. *France* (footnote 497 above), p. 438.

292. With respect to international or "hybrid" courts, the International Tribunal for the Former Yugoslavia rejected any affect of a national amnesty upon its jurisdiction;[502] it further maintained that amnesties for international offences were generally invalid under international law, a position that has been criticized.[503] Other international courts or hybrid tribunals have been more cautious on the latter point, indicating that this is an area where the law is "developing" or where there is an "emerging consensus". For example, article 10 of the Statute of the Special Court for Sierra Leone included a clause providing that an amnesty was not a bar to prosecution before that court.[504] Based on article 10, the Appeals Chamber of the Special Court for Sierra Leone consistently held that article IX of the Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone was not a bar to the jurisdiction of the Special Court. While the Special Court found "support for the statement that it is a crystallized norm of international law that a government cannot grant amnesty for serious crimes under international law",[505] it recognized that this presented the "direction in which customary international law is developing",[506] adopting Antonio Cassese's analysis

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[502] See, for example, *Prosecutor* v. *Anto Furundžija, Case No. IT-95-17/1-T, Judgment of 10 December 1998*, Trial Chamber II, paragraph 155; see also *the Belfast Guidelines on Amnesty and Accountability* (footnote 491 above), guideline 18; *Prosecutor* v. *Karadžić, Case No. IT-95-5/18-PT Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008*, Trial Chamber International Criminal Court for the former Yugoslavia, paragraphs 17 and 25; and *Prosecutor* v. *Karadžić, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009*, Appeals Chamber, International Criminal Tribunal for the former Yugoslavia, paragraph 52.

[503] For example, the International Criminal Tribunal for the former Yugoslavia held that the *jus cogens* prohibition on torture delegitimized any amnesty for torture. Roger O'Keefe, however, has argued that "the hypothetical peremptory status of an international criminal prohibition has no logical implications for the international legality of a statute of limitations or amnesty in respect of that crime" (O'Keefe, footnote 501 above, p. 476).

[504] Art. 10 ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution"). For similar provisions, see the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, article 40 ("The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers"); and the Statute of the Special Tribunal for Lebanon (footnote 255 above), article 6 ("An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution").

[505] *Prosecutor* v. *Moinina Fofana, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 25 May 2004*, Appeals Chamber, Special Court for Sierra Leone, para. 3.

[506] *Prosecutor* v. *Kallon and Kamara,Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004*, Appeals Chamber, Special Court for Sierra Leone, paras. 71 and 82–84, especially para. 84. See also Cassesse *et al.* (footnote 234 above), p. 312. Cassese further states that "[i]t should be added that whenever general rules prohibiting specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing among other things the obligation not to cancel by legislative or executive fiat the crimes they proscribe. … The same argument should hold true for genocide and crimes against humanity, since there

that there was not yet any general obligation for States to refrain from amnesty laws for crimes against humanity.

293. The Extraordinary Chambers in the Courts of Cambodia concluded that there was an "emerging consensus" that prohibits amnesties in relation to serious international crimes based on a duty to investigate and prosecute these crimes and to punish their perpetrators.[507] However, the Trial Chamber accepted that State practice was arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them.[508]

294. Amnesties have been found impermissible by regional human rights courts because they preclude accountability under regional human rights treaties, although some distinctions may be found as among those courts. In its seminal case of *Barrios Altos* v. *Peru*, the Inter-American Court of Human Rights held that all amnesty provisions are inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious violations of non-derogable rights under the American Convention on Human Rights: "Pact of San José, Costa Rica".[509] In *Almonacid-Arellano* et al. v. *Chile*, the Court also concluded that "crimes against humanity are crimes which cannot be susceptible of amnesty".[510] In *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*, the African Commission on Human and Peoples' Rights found that "[t]here has been consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights [violations] has become a rule of customary international law".[511] In *Marguš* v. *Croatia*, the European Court of Human Rights more cautiously recognized the "growing tendency in international law" to see amnesties to grave breaches of fundamental human rights as unacceptable as they are incompatible with the unanimously recognized obligation of States to prosecute and punish such crimes. However, the Court noted that amnesties may be possible in particular circumstances, such as a reconciliation process and/or as a form of compensation to victims, while holding that those circumstances were not relevant in that particular case.[512]

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seems to be conclusive evidence that conduct amounting to such crimes is prohibited by peremptory norms of international law. It would follow that amnesty passed for such crimes would not be applicable as contrary to international law" (*ibid.*).

[507] See *Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem *and Amnesty and Pardon), Case No. 002/19-09-2007/ECCC/TC, 3 November 2011*, Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, paragraph 53. The European Court of Human Rights, in *Marguš* v. *Croatia* (see footnote 420 above) cited submissions by interveners in that case that, since the Second World War, States have increasingly relied on amnesty laws (para. 110). Although the number of new amnesty laws excluding international crimes had increased, so too had the number of amnesties including such crimes.

[508] *Ibid.*

[509] *Barrios Altos* v. *Peru* (see footnote 420 above), para. 41. See also *The Massacres of El Mozote and Nearby Places* v. *El Salvador, Judgment of 25 October 2012*, Inter-American Court of Human Rights, *Series C, No. 252*, paragraphs 283–286.

[510] *Almonacid-Arellano* et al. v. *Chile* (see footnote 418 above), para. 114. See also *ibid.*, paragraph 129.

[511] *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe, Communication No. 245/02, Decision of 15 May 2006*, African Commission on Human and Peoples' Rights, para. 201.

[512] *Marguš* v. *Croatia* (see footnote 420 above), para. 139.

295. This mixed practice is summarized in *the Belfast Guidelines on Amnesty and Accountability*:

> Crimes against humanity and war crimes committed in non-international armed conflicts have been defined in the Rome Statute of the International Criminal Court (ICC) and where it has jurisdiction, the ICC can prosecute these crimes. These developments together with the case law of international courts and the opinions of authoritative bodies have provided greater clarity on the nature of these offences and contributed to a body of opinion to support the existence of a customary prohibition on amnesties for international crimes. However, other sources of *opinio juris* from domestic and hybrid courts together with state practice on amnesties does not reflect an established, explicit and categorical customary prohibition of amnesties for international crimes.[513]

296. As a result, many publicists have found it difficult to conclude that there is a consensus on whether a complete prohibition on amnesties, even for serious crimes, has attained the status of customary international law.[514] Rather, such publicists call for taking account of situation-specific various factors, such as whether the particular amnesty provisions amount to a blanket amnesty or provide relevant conditions, or exclude those most responsible for the crimes committed.[515]

297. Consistent with the approach taken in prior treaties addressing crimes, the Special Rapporteur is of the view that the present draft articles should not address the issue of amnesties under national law. Any amnesty granted by a State would have to be evaluated in light of that State's obligations under, *inter alia*, draft articles 9 and 14, and under customary international law as it currently exists or as it evolves in the future. Further, it should be recalled that a national amnesty would not bar prosecution of a crime against humanity by a competent international criminal tribunal or a foreign State with concurrent prescriptive jurisdiction over that crime.

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[513] *The Belfast Guidelines on Amnesty and Accountability* (see footnote 491 above), guideline 6 d). See also L. Mallinder, "The end of amnesty or regional overreach? Interpreting the erosion of South America's amnesty laws", *International and Comparative Law Quarterly*, vol. 65 (July 2016), pp. 645–680.

[514] See, for example, R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge University Press, 2014, pp. 570–572; and O'Keefe (footnote 501 above), pp. 468–469 and 474.

[515] See *the Belfast Guidelines on Amnesty and Accountability* (footnote 491 above), guidelines 7 and 8. See also *Decision on Ieng Sary's Rule 89 Preliminary Objections* (footnote 507 above), paragraph 52, in which the Extraordinary Chambers in the Courts of Cambodia noted that certain conditional amnesties have met with widespread approval, such as in South Africa where amnesties were granted as part of the reconciliation process.

Chapter IX
Preamble

298. A preamble to the present draft articles might highlight several core elements that motivate and justify the present draft articles: the fact that over the course of history crimes against humanity, which deeply shock the conscience of humanity, have been committed, causing extreme harm and suffering to children, women and men; the fact that such crimes threaten international peace and security; the desire that such crimes be punished, including through measures taken at the national level and with the support of inter-State cooperation; the value of punishment as a means of preventing such crimes from happening again; and therefore the duty of States to exercise their criminal jurisdiction over those responsible for such crimes. Further, the preamble is an appropriate place to reaffirm the basic purposes and principles of the Charter of the United Nations, including rules with respect to the use of force and non-intervention, with which the present draft articles are consistent and do not seek to change.

299. Prior instruments provide guidance in this regard. Notably, the preamble to the Convention on the Prevention and Punishment of the Crime of Genocide provides in part:

> *Recognizing* that at all periods of history genocide has inflicted great losses on humanity, and
>
> *Being convinced* that, in order to liberate mankind from such an odious scourge, international co-operation is required ...

300. The preamble of the Rome Statute of the International Criminal Court provides in part:

> *Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
>
> *Recognizing* that such grave crimes threaten the peace, security and well-being of the world,
>
> *Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> *Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
>
> *Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
>
> *Reaffirming* the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

> *Emphasizing* in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State ...

301. Bearing these considerations in mind, the Special Rapporteur proposes the following draft preamble:

Draft preamble

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that such crimes against humanity threaten the peace, security and well-being of the world,

Affirming that crimes against humanity, one of the most serious crimes of concern to the international community as a whole, must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in the present draft articles shall be taken as authorizing any State to intervene in an armed conflict or in the internal affairs of any other State,

Chapter X

Final clauses of a convention

A. Final clauses in the work of the Commission

302. The syllabus for this topic provided that the objective is "to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity".[516] Such a convention ultimately would need to have final clauses, potentially addressing issues such as: adoption and authentication of the treaty; the depositary; participation in the treaty; signature; methods of consent to be bound; provisional application; reservations; declarations; notifications; entry into force; registration and publication; authentic texts; amendment; duration; and termination.[517]

303. The statute of the Commission is silent on the possibility for the Commission to propose final clauses of a draft convention to the General Assembly. At the same time, the statute does not place any limitation on the type of draft articles that can be submitted to the General Assembly. Article 22 of the statute merely requires the Commission to prepare a "final" draft and explanatory report, which it shall submit with its recommendation. Article 23, paragraph 1 (*c*), of the statute provides that the draft can be recommended with a view to the conclusion of a convention, without limiting the possible content of the draft.

304. In practice, however, the Commission has only twice proposed final clauses for draft conventions to the General Assembly: the draft convention on the reduction of future statelessness and the draft convention on the elimination of future statelessness.[518] Those two topics were included in the Commission's list of topics of international law selected for codification. Noting these recommendations, in 1950 the Economic and Social Council requested the Commission to undertake the drafting of two conventions.[519] Thereafter, at its sixth session in 1954, the Commission adopted the draft convention on the reduction of future statelessness and the draft convention on the elimination of future statelessness, both of which contained final clauses.

305. In light of this prior practice, the present report does not recommend that the Commission adopt draft articles that would serve as final clauses to a convention. Nevertheless, given the Commission's prior work on the topic of reservations, and the possibility that States may wish for further guidance on this issue specifically in the context of a convention on the prevention and punishment of crimes against humanity, the remainder of this chapter discusses possible options for a final clause relating to reservations.

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[516] See *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 10* (A/68/10), p. 140, Annex B, paragraph 3.

[517] See *Final Clauses of Multilateral Treaties: Handbook* (United Nations publication, Sales No. E.04.V.3), available from https://treaties.un.org/doc/source/publications/fc/english.pdf.

[518] *Yearbook … 1954*, vol. II, document A/CN.4/81, p. 26.

[519] Economic and Social Council resolution 304 D (XI) of 17 July 1950; and Economic and Social Council resolution 319 B (XI) of 11 August 1950.

B. Balancing of interests with respect to reservations to a treaty

306. The Commission has previously addressed reservations in the context of treaty law generally, notably in the 1969 Vienna Convention (arts. 19-23), the 1978 Vienna Convention on succession of States in respect of treaties (art. 20) and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the "1986 Vienna Convention"), and most recently in its 2011 Guide to Practice on reservations to treaties.[520] Adopting a composite of the definitions included in the 1969 Vienna Convention[521] and the 1986 Vienna Convention,[522] the Commission defined reservations in guideline 1.1 of the 2011 Guide to Practice on reservations to treaties as follows:

> "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.[523]

307. The Commission recognized that reservations are substantially linked to a State's consent to be bound by a treaty and are an important tool for building consensus around and participation in multilateral treaties.[524] Appropriately formulated reservations allow States to participate in treaties while providing a method to account for their different legal and political systems. Allowing such flexibility is particularly pertinent for treaties and conventions that promote the adoption of national laws.[525] Further, the Commission concluded that there was no

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[520] Guide to Practice on reservations to treaties, *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10/Add.1).

[521] Art. 2, para. (1) (d) ("'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State").

[522] Art. 2, para. (1) (d) ("'reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization").

[523] Guide to Practice on reservations to treaties (see footnote 520 above).

[524] Ibid., guideline 4.3 and the commentary thereto. See also General Assembly resolution 68/111 of 16 December 2013, preamble ("Recognizing the role that reservations to treaties may play in achieving a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and facilitating wide participation therein").

[525] In the 2011 Guide to Practice on reservations to treaties, the Commission noted that a State very often formulates a reservation because the treaty imposes on it obligations incompatible with its internal law, which it is not in a position to amend, at least initially. The Commission developed guideline 3.1.5.5, concerned with reservations relating to internal law "to establish that, contrary to an erroneous but fairly widespread perception, a reservation is not invalid solely because it aims to preserve the integrity of specific rules of internal law—on the understanding that, as is the case of any reservation, those made with such an objective must be compatible with the object and purpose of the treaty to which they relate" (Guide to Practice on reservations to

reason to apply different rules on reservations to human rights treaties determining that, even in the case of essential rights, reservations are possible if they do not preclude protection of the rights in question and do not have the effect of excessively modifying the legal regime.[526]

308. On the other hand, in the context of human rights treaties, some States,[527] treaty bodies[528] and commentators have expressed concern about the potential for general, unlimited reservations to undermine the integrity of a treaty. For example, concerns have been expressed[529] about the extent and impact of reservations on the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. In a report following its eighteenth and nineteenth sessions, the Committee on the Elimination of Discrimination against Women adopted a statement on reservations, noting with concern the number and extent of reservations to the Convention, including the fact that some reservations are drawn so widely that they cannot be limited to specific provisions.[530] The 1993 Vienna Declaration and

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treaties (see footnote 520 above), para. (7) of the commentary to guideline 3.1.5.5)). Further, the Commission recognized that the concern of a State or international organization to preserve its freedom of action while accepting in principle to limit that freedom by becoming bound by a treaty is particularly present in two situations: "where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules" (*ibid.*, para. (1) of the commentary to guideline 1.7.1).

[526] *Ibid.*, paras. (5)–(9) of the commentary to guideline 3.1.5.6. Professor Edward Swaine similarly observes that, "[w]hile reservations, by definition, seek unilaterally to compromise a State's treaty obligations, States are nonetheless presumptively free to propose them. Generally they do so to adapt the treaty to domestic legal and political circumstances in matters that are usually of keen local (and, happily, minimal international) interest" (E. T. Swaine, "Treaty reservations", in Hollis (see footnote 309 above), pp. 277–303). Professor Schabas also asserts that "[a]rticle 27 should not be invoked in the context of the legality of reservations. Normally, states make reservations precisely because their internal law is in conflict with the treaty. Indeed, the Human Rights Committee specifically urges states 'to indicate in precise terms the domestic legislation or practices which [they believe] to be incompatible with the Covenant obligation reserved'" (W. A. Schabas, "Reservations to human rights treaties: time for innovation and reform", *The Canadian Yearbook of International Law*, vol. XXXII (1994), pp. 39–82, at p. 59).

[527] See the Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth session, Supplement No. 40* (A/50/40, Annex), observations of the United Kingdom, paragraph 3.

[528] See the Human Rights Committee's general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant (CCPR/C/21/Rev.1/Add.6).

[529] See W. A. Schabas, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the rights of the child", *William and Mary Journal of Women and the Law*, vol. 3, No. 1 (Spring 1997), pp. 79–112, at p. 80. Despite these criticisms, Professor Schabas observes that, "[i]n many cases, these reservations are quite precise and limited, and leave most of the instrument intact. … Indeed, [the drafters'] intent was to allow such minor reservations specifically in order to encourage widespread ratification, and this goal has been accomplished" (*ibid.*, p. 110).

[530] See the Report of the Committee on the Elimination of Discrimination against Women, *Official Records of the General Assembly, Fifty-third session, Supplement No. 38* (A/53/38/Rev.1), pp. 47–49.

Programme of Action from the World Conference on Human Rights urged States, as far as possible, to avoid resorting to reservations.[531]

309. Thus, the issue of reservations may be seen, to a large extent, as a debate between promoting breadth of State participation in a treaty regime (by allowing States to calibrate their obligations so as to harmonize with difficult-to-change national law)[532] and ensuring that the depth of the regime remains meaningfully intact (by limiting or prohibiting such changes). Reflecting on this debate, the Commission noted, in its conclusions on the reservations dialogue, the necessity of bearing in mind "the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein".[533]

C. Approaches taken in existing treaties to reservations

310. There appear to be at least five different approaches for addressing the issue of reservations. For each approach, the treaty is governed, in the first instance, by any relevant provision within the treaty on reservations and, in the second instance, by the provisions on reservations contained in the conventional or customary international law relating to reservations.

311. First, the treaty might be completely silent on the issue of reservations, such as the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions for the protection of war victims and the International Covenant on Civil and Political Rights. Alternatively, the treaty might contain a provision permitting reservations.[534]

312. Second, the treaty generally might be silent on the issue of reservations, except for a provision that permits a reservation (sometimes styled as a declaration) to the treaty's dispute settlement mechanism. This is the dominant approach[535] for treaties

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[531] See the Vienna Declaration and Programme of Action (A/CONF.157/24 (Part I))), section I, paragraph 26. In section II, the Declaration notes that, "[t]he World Conference on Human Rights encourages States to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them" (*ibid.*, chap. II, para. 5).

[532] For example, in the 2011 Guide to Practice on reservations to treaties, the Commission noted the reservation by Mozambique to the International Convention against the taking of hostages as an example of reservations relating to the application of internal law that "give rise to no objections and have in fact not met with any" (Guide to Practice on reservations to treaties (see footnote 520 above), para. (4) of the commentary to guideline 3.1.5.5). Mozambique declared that, in accordance with its Constitution and domestic law, it could not extradite its citizens (*ibid.*, last footnote to paragraph (4) of the commentary to guideline 3.1.5.5).

[533] Guide to Practice on reservations to treaties (see footnote 520 above), Annex, p. 601.

[534] See, for example, the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, article 14, paragraph 1 ("When definitively signing, ratifying or acceding to this Convention or any amendment hereto, a State Party may make reservations").

[535] Exceptions to this include: the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 9 (prohibiting all reservations); the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, art. 26, para. 1 (prohibiting all reservations); the International Convention on the

addressing crimes in national law, as may be seen in: the Convention for the suppression of unlawful seizure of aircraft;[536] the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[537] the International Convention against the taking of hostages;[538] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[539] the Convention on the Safety of United Nations and Associated Personnel;[540] the International Convention for the Suppression of Terrorist Bombings;[541] the International Convention for the Suppression of the Financing of Terrorism;[542] the United Nations Convention against Transnational Organized Crime[543] and accompanying Protocols; and the International Convention for the Protection of All Persons from Enforced Disappearance.[544] Such an approach does not necessarily implicitly preclude other reservations to the treaty.[545] Rather, it

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Suppression and Punishment of the Crime of *Apartheid* (silent on reservations); and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (silent on reservations).

[536] Art. 12, para. 2 ("Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation").

[537] Art. 13 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[538] Art. 16 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[539] Art. 30 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft). Article 28 contains a clause providing for an opt-out in relation to article 20, concerning the competence of the Committee Against Torture. In contrast, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 30, prohibits reservations completely.

[540] Art. 22 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[541] Art. 20 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[542] Art. 24 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[543] Art. 35 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft).

[544] Art. 42 (almost identical language to the Convention for the suppression of unlawful seizure of aircraft). At the fifth session of the inter-sessional open-ended working group, the Chairperson noted that States parties would have the right to enter reservations at the time of accession, on the understanding that such reservations must be in keeping with international law (Commission on Human Rights, Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2006/57), para. 160).

[545] The 1969 Vienna Convention, article 19 (a) and (b), provides that a reservation may be formulated unless the treaty prohibits all reservations or the treaty prohibits specified reservations which do not include the reservation in question. Such language does not directly address the situation of a treaty that permits specified reservations and is silent with respect to other reservations. In its Guide to Practice on reservations to treaties, the Commission stipulated that: "A cursory reading of article 19, subparagraph (b), of the Vienna Conventions might suggest that it represents one side of the coin and subparagraph (a) represents the other. The symmetry is far from total, however. To have total symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited. But that is not the case. Subparagraph (b) contains additional elements which prevent

simply makes clear that a reservation to the treaty's dispute settlement mechanism does not defeat the object and purpose of the treaty.

313. Third, the treaty might contain a provision identifying articles to which reservations may be formulated, while prohibiting all other reservations. Examples of this approach may be found in: the 1949 Revised General Act for the Pacific Settlement of International Disputes;[546] the 1961 Single Convention on Narcotic Drugs;[547] the 1971 Convention on psychotropic substances;[548] the 1982 United Nations Convention on the Law of the Sea;[549] the Second Optional Protocol to the

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oversimplification. The implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, depends on the fulfilment of three conditions: (a) The treaty's reservation clause must permit the formulation of reservations; (b) The reservations permitted must be 'specified'; (c) It must be specified that 'only' those reservations 'may be made'" (Guide to Practice on reservations to treaties (see footnote 520 above), para. (1) of the commentary to guideline 3.1.2).

[546] Art. 39, paras. (1)–(2) ("1. In addition to the power given in the preceding article, a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession. 2. These reservations may be such as to exclude from the procedure described in the present Act: (*a*) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute; (*b*) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States; (*c*) Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories").

[547] Art. 50 ("1. No reservations other than those made in accordance with article 49 or with the following paragraphs shall be permitted. 2. Any State may at the time of signature, ratification or accession make reservations in respect of the following provisions of this Convention: Article 12, paragraphs 2 and 3; article 13, paragraph 2; article 14, paragraphs 1 and 2; article 31, paragraph 1 *(b)*, and article 48. 3. A State which desires to become a Party but wishes to be authorized to make reservations other than those made in accordance with paragraph 2 of this article or with article 49 may inform the Secretary-General of such intention. Unless by the end of twelve months after the date of the Secretary-General's communication of the reservation concerned, this reservation has been objected to by one third of the States that have ratified or acceded to this Convention before the end of that period, it shall be deemed to be permitted, it being understood, however, that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation").

[548] Art. 32 ("1. No reservation other than those made in accordance with paragraphs 2, 3 and 4 of the present article shall be permitted. 2. Any State may at the time of signature, ratification or accession make reservations in respect of the following provisions of the present Convention: (*a*) Article 19, paragraphs 1 and 2; (*b*) Article 27; and (*c*) Article 31. 3. A State which desires to become a Party but wishes to be authorized to make reservations other than those made in accordance with paragraphs 2 and 4 may inform the Secretary-General of such intention. Unless by the end of twelve months after the date of the Secretary-General's communication of the reservation concerned, this reservation has been objected to by one third of the States that have signed without reservation of ratification, ratified or acceded to this Convention before the end of that period, it shall be deemed to be permitted, it being understood, however, that States which have objected to the reservation need not assume towards the reserving State any legal obligation under this Convention which is affected by the reservation").

[549] Art. 309 ("No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention"). In fact, no article of the Convention expressly permits reservations, although article 298 allows for declarations opting out of compulsory procedures for certain categories of disputes. Article 310 of the Convention provides that interpretative declarations are permitted "provided that such declarations or statements do not

International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;[550] and the 1992 European Charter for Regional or Minority Languages.[551]

314. Fourth, the treaty might contain a provision identifying treaty articles, or category of articles, to which reservations may not be formulated, while permitting all other reservations. Examples of this approach are: the Convention relating to the Status of Refugees;[552] the 1958 Convention on the Continental Shelf;[553] and the International Sugar Agreement, 1977.[554]

315. A variation of this approach is a provision prohibiting reservations that defeat the object and purpose of the treaty, but otherwise allowing reservations. Examples of such an approach are: the International Convention on the Elimination of All Forms of Racial Discrimination;[555] the Convention on the Elimination of All Forms of Discrimination against Women;[556] the Convention on the rights of the child;[557]

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purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State".

[550] Art. 2, para. 1 (" No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime").

[551] Art. 21, para. 1 ("Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, make one or more reservations to paragraphs 2 to 5 of Article 7 of this Charter. No other reservation may be made").

[552] Art. 42 ("1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36–46 inclusive. 2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations"). See also the Convention relating to the Status of Stateless Persons, article 38.

[553] Art. 12 ("1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive. 2. Any Contracting State making a reservation in accordance with the preceding paragraph may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations").

[554] Article 78, paragraph 3, reads, in relevant part: "Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement."

[555] Art. 20, para. 2 ("A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it"). For criticisms of the formulation adopted in this Convention, see the Commission's Guide to Practice on reservations to treaties in which the Commission noted that "[i]t must be admitted, however, that such clauses—however attractive they may seem intellectually—are, in any case, far from resolving all the problems: in practice they do not encourage States parties to maintain the special vigilance that is to be expected of them and they leave important questions unanswered" (Guide to Practice on reservations to treaties (see footnote 520 above), para. (4) of the commentary to guideline 3.2).

[556] Art. 28, para. 2 ("A reservation incompatible with the object and purpose of the present Convention shall not be permitted").

[557] Art. 51, para. 2 ("A reservation incompatible with the object and purpose of the present Convention shall not be permitted").

and the OAU Convention on the Prevention and Combating of Terrorism.[558] The "object and purpose" test, of course, was articulated in the International Court of Justice's 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[559] where the Court held that the "object and purpose" of the Convention limits both the freedom of making reservations and that of objecting to them.[560] This "object and purpose" test was adopted in article 19, paragraph (c), of the 1969 and 1986 Vienna Conventions, and was analysed in the Commission's 2011 Guide to Practice on reservations to treaties.[561]

316. A further variation is where a treaty prohibits "reservations of a general character", an approach designed to avoid vague reservations whose effects are unclear and therefore difficult to assess.[562] Examples of such a provision may be found in: the European Convention on Human Rights;[563] the Inter-American Convention to Prevent and Punish Torture;[564] and the Inter-American Convention on Forced Disappearance of Persons.[565]

317. Fifth, the treaty may contain a provision prohibiting all reservations.[566] Whether a particular treaty actually prohibits all reservations needs to be carefully assessed based on other flexibility mechanisms[567] or techniques used[568] for opting

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[558] Art. 19, para. 4 ("No State Party may enter a reservation which is incompatible with the object and purposes of this Convention").

[559] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15. Some scholars consider the International Court of Justice's 1951 advisory opinion as the "starting point" in any analysis of reservations to international human rights treaties. See Schabas, "Reservations to human rights treaties ..." (footnote 526 above), p. 45.

[560] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote above), p. 24. The International Court of Justice further held that "it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation" (*ibid.*).

[561] See, for example, Guide to Practice on reservations to treaties (footnote 520 above), guideline 3.1.5 on "Incompatibility of a reservation with the object and purpose of the treaty" ("A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty").

[562] *Ibid.*, guideline 3.1.5.2 on "Vague or general reservations" ("A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess its compatibility with the object and purpose of the treaty").

[563] Art. 57 ("1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article. 2. Any reservation made under this Article shall contain a brief statement of the law concerned").

[564] Art. 21 ("The States Parties may, at the time of approval, signature, ratification, or accession, make reservations to this Convention, provided that such reservations are not incompatible with the object and purpose of the Convention and concern one or more specific provisions").

[565] Art. XIX ("The states may express reservations with respect to this Convention when adopting, signing, ratifying or acceding to it, unless such reservations are incompatible with the object and purpose of the Convention and as long as they refer to one or more specific provisions").

[566] See the Guide to Practice on reservations to treaties (footnote 520 above), guideline 3.1.1.

[567] For example, many environmental and labor treaties include differential treatment rules. See

out of some obligations. Notable examples of treaties that prohibit all reservations are the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change[569] and the Rome Statute of the International Criminal Court.[570] Aside from some treaties that are found at the regional or subregional level,[571] most treaties that prohibit reservations are not focused on how a State party should regulate persons or property within the State's territory; the few that do so typically do not concern criminal jurisdiction.[572]

318. With respect to the Rome Statute of the International Criminal Court, the prohibition on reservations appears closely tied to the desire to establish an international institution that would have the exact same legal relationship *vis-à-vis* all States parties. The Commission noted in its draft of what became the Rome Statute of the International Criminal Court that "[t]he draft statute has been constructed as an overall scheme, incorporating important balances and qualifications in relation to the working of the court: it is intended to operate as a whole. These considerations tend to support the view that reservations to the statute and its accompanying treaty should either not be permitted, or should be limited in scope".[573] Of course, a complete prohibition of reservations does not prevent

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L. R. Helfer, "Not fully committed? Reservations, risk and treaty design", *Yale Journal of International Law*, vol. 31, No. 2 (Summer 2006), pp. 367–382, at p. 377. See also the Guide to Practice on reservations to treaties (footnote 520 above), guideline 1.1.6 and guideline 1.7, on alternatives to reservations and interpretative declarations. The Guide to Practice cites the statement of the Legal Adviser of the International Labour Organization to the 1968 United Nations Conference on the Law of the Treaties. The Legal Adviser stated that reservations to international labor conventions were incompatible with the object and purpose of those Conventions and inapplicable because of the tripartite character of the ILO as an organization but noted that great flexibility was required for the application of certain international labour conventions to widely varying circumstances (Guide to Practice on reservations to treaties (see footnote 520 above), para. (3) of the commentary to guideline 1.1.6).

[568] Professor Swaine notes that a number of treaties, including in the area of trade, environmental and arms control in the first instance appear to prohibit all reservations, but on inspection actually enable reservations to affiliated agreements or to technical and dynamic content (Swaine (see footnote 526 above), p. 290).

[569] Art. 26 ("No reservations made be made to this Protocol").

[570] Art. 120 ("No reservations may be made to this Statute"). Article 124 of the Rome Statute of the International Criminal Court did provide a transitional provision allowing States not to accept the jurisdiction of the Court in respect of war crimes for a period of seven years.

[571] See, for example, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundametnal Freedoms concerning the Abolition of the Death Penalty, as amended by Protocol No. 11, article 4; and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, article 21.

[572] See, for example, the Convention against Discrimination in Education, article 9; the Montreal Protocol on Substances that Deplete the Ozone Layer, article 18; the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, article 19; and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, article XXII (although reservations are permitted to the Convention's annexes that are not incompatible with its object and purpose). Yet treaties prohibiting reservations and touching upon national criminal jurisdiction do exist. See the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, article 9; and the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, article 26.

[573] *Yearbook ... 1994*, vol. II (Part Two), p. 69, Appendix I, para. 3 (e). The Commission also noted that, "[w]hether or not the statute would be considered to be 'a constituent instrument of an

controversy arising when a State ratifies a treaty, as the State may still file a "declaration" that arguably seeks to alter unilaterally the State's obligations. A scholarly commentary to the Rome Statute of the International Criminal Court noted that forbidding reservations, in the belief that the problems with reservations can be prevented, is a "deceptively simple" solution.[574] For example, Denmark, Finland, Germany, Ireland, the Netherlands, Norway, Sweden and the United Kingdom objected to the "interpretative declaration" by Uruguay to the Rome Statute of the International Criminal Court as amounting, in substance, to a reservation.[575]

319. For treaties that allow reservations, it is possible to include a provision requiring States parties to indicate reasons why the reservation is being made. For example, the European Convention on Human Rights requires that States should indicate the reasons why a reservation is being formulated, specifically providing that any reservation made "shall contain a brief statement of the law concerned".[576] While recognizing that this Convention is *lex specialis* and that there is no requirement under the 1969 and 1986 Vienna Conventions[577] to give reasons for reservations, the Commission concluded that there were "obvious advantages of giving reasons",[578] and included in guideline 2.1.2 that "[a] reservation should, to the extent possible, indicate the reasons why it is being formulated".[579]

320. Other mechanisms, not amounting to reservations, can also be used to enable States and international organizations to modify obligations under treaties to which

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international organization' within the meaning of article 20, paragraph 3, of the Vienna Convention of the Law of Treaties, it is certainly closely analogous to a constituent instrument, and the considerations which led the drafters to require the consent of the 'competent organ of that organization' under article 20, paragraph 3, apply in rather similar fashion to it" (*ibid.*).

[574] See Schabas, *The International Criminal Court* (footnote 257 above), p. 1489. Writing outside his capacity as Special Rapporteur, Professor Pellet observed that "[i]t is not certain that the possibility of limited, well-circumscribed reservations would have harmed the fundamental objectives aimed at, and it would have certainly facilitated ratification of the Rome Statute [of the International Criminal Court] by States that in good faith strive to overcome constitutional obstacles they meet on technical points that all in all are of only secondary importance" (A. Pellet, "Entry into force and amendment of the Statute", in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, vol. I, Oxford University Press, 2002, p. 156).

[575] See *Multilateral Treaties Deposited with the Secretary-General* (available from http://treaties.un.org/), chap. XVIII.10. The interpretative declaration stated that, "as a State party to the [Rome Statute of the International Criminal Court], the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic". The interpretative declaration was withdrawn in a communication on 26 February 2008.

[576] See the European Convention on Human Rights, article 57, paragraph 2.

[577] The Commission has noted: "Neither the Commission's work on the law of treaties nor the 1969 and 1986 Vienna Conventions establish any requirement that a State or international organization that formulates a reservation must give its reasons for doing so or explain why it considered it necessary to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects" (Guide to Practice on reservations to treaties (see footnote 520 above), para. (1) of the commentary to guideline 2.1.2).

[578] *Ibid.*, para. (8) of the commentary to guideline 2.1.2.

[579] *Ibid.*, guideline 2.1.2.

they are parties, including restrictive clauses,[580] escape clauses,[581] "opting-in" or "contracting-in clauses",[582] "opting-out" or "contracting-out clauses",[583] clauses which offer the parties a choice among several provisions or provisions allowing for suspension or amendments to a treaty. In its Guide to Practice on reservations to treaties, the Commission noted that "these procedures, far from constituting invitations to States to limit the effects of the treaty, would instead help to make recourse to reservations less 'necessary' or frequent by offering more flexible treaty techniques".[584]

D. Reservations in the context of a convention on crimes against humanity

321. To the extent that the present draft articles are transformed into a convention, it would appear that the approaches identified above are all available as possibilities for one of the final clauses to the convention.

322. The convention could be completely silent on the issue of reservations or expressly permit all reservations, leaving it open for States to file reservations that they deem necessary, within the constraints of the rules set forth in the Vienna Conventions.

323. The convention could be generally silent on the issue of reservations, though provide for an opportunity for States to opt out of any dispute settlement mechanism. If draft article 17 (discussed above in the chapter on monitoring mechanisms and dispute settlement) is adopted as proposed, then States would have this opportunity. Such an approach in a convention on the prevention and punishment of crimes against humanity would be consistent with the approach taken in other global treaties addressing crimes. If this is done, background rules on treaty law, either conventional or customary in nature, would still apply, thereby barring

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[580] Defined in the Guide to Practice on reservations to treaties as clauses "'which limit the purpose of the obligation by making exceptions to and placing limits on it' in respect of the area covered by the obligation or its period of validity" (Guide to Practice on reservations to treaties (see footnote 520 above), para. (6) of the commentary to guideline 1.7.1).

[581] Defined in the Guide to Practice on reservations to treaties as clauses "'which have as their purpose to suspend the application of general obligations in specific cases', and among which mention can be made of saving and derogations clauses" (*ibid.*).

[582] Defined in the Guide to Practice on reservations to treaties as clauses "'to which the parties accede only through a special acceptance procedure, separate from accession to the treaty as a whole'" (*ibid.*).

[583] Defined in the Guide to Practice on reservations to treaties as clauses "'under which a State will be bound by rules adopted by majority vote even if it does not express its intent not to be bound within a certain period of time'" (*ibid.*).

[584] *Ibid.*, para. (1) of the general commentary to subsection 1.7 on "Alternatives to reservations and interpretative declarations". See also *ibid.*, guideline 1.7.1, entitled "Alternatives to reservations" ("In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as: (*a*) the insertion in the treaty of a clause purporting to limit its scope or application; (*b*) the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves").

States from making reservations that defeat the object and purpose of the convention.

324. The convention could contain a provision identifying articles of the convention to which reservations may be filed, while prohibiting all other reservations. Conversely, the convention might contain a provision identifying treaty articles to which reservations may not be filed, while permitting all other reservations. Such approaches obviously would require identifying the particular articles within a convention to which States parties see a strong need to allow for, or prohibit, reservations.

325. Alternatively, a more general provision might be crafted that prohibits certain types of reservations, such as reservations that defeat the object and purpose of the treaty. While such a provision, strictly speaking, is not necessary since reservations of that kind are already prohibited under international law, this type of text appears in many conventions relating to human rights and is apparently seen as a useful reminder to States parties. Further, a provision could be included stating that when reservations are made, they must be focused on specific provisions of the convention, thereby prohibiting reservations of a general nature. This additional element could help to avoid the problem of "constitutional" reservations or reservations that seek to subordinate a treaty to the national law of the reserving State as a whole, from which it is difficult to determine the effect on the reserving State's obligations. Finally, a provision might be included requiring States to provide reasons both for any reservations formulated or objections by other States to a reservation, as included in the European Convention on Human Rights in relation to reservations. If this is done, such a provision might read as follows:

> "1. States may, at the time of approval, signature and ratification, or accession, make reservations to this convention, [other than to articles ...], provided that such reservations are not incompatible with the object and purpose of the convention and concern one or more specific provisions.
>
> "2. States shall, to the extent possible, indicate the reasons why a reservation in accordance with paragraph 1, or objection to a reservation, is being formulated."

326. Finally, the convention could contain a complete prohibition on reservations. Doing so might avoid some types of reservations that radically alter the obligations of the convention, but would also deny States any opportunity to calibrate the interface of the convention with uncontroversial aspects of their national criminal law, some of which may be constitutional and therefore difficult to change. If so, a complete prohibition might preclude the widespread adherence of States to the convention.

Chapter XI

Future programme of work

327. A possible timetable for the subsequent programme of work would be to complete this topic on first reading in 2017. Alternatively, if additional work is required, a fourth report addressing any further matters could be submitted in 2018, after which a first reading could be completed.

328. If the topic is completed on first reading in 2017, then a second reading could be completed in 2019.

Annex I

Draft articles provisionally adopted by the Commission to date

Article 1. ***Scope***

The present draft articles apply to the prevention and punishment of crimes against humanity.

Article 2. ***General obligation***

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Article 3. ***Definition of crimes against humanity***

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Article 4. *Obligation of prevention*

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

Article 5. *Criminalization under national law*

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that the following are offences under its criminal law:

(a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

> *(i)* that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> *(ii)* that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph *(a)*, a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

> *(i)* the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> *(ii)* the crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> *(iii)* the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

7. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Article 6. *Establishment of national jurisdiction*

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(c) when the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Article 7. *Investigation*

Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

Article 8. *Preliminary measures when an alleged offender is present*

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence referred to in draft article 5 is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of

that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 6, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 9. Aut dedere aut judicare

The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Article 10. *Fair treatment of the alleged offender*

1. Any person against whom measures are being taken in connection with an offence referred to in draft article 5 shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Annex II

Draft articles and preamble proposed in the third report

Draft article 11. *Extradition*

1. Each of the offences referred to in draft article 5 shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. For the purposes of extradition between States, an offence referred to in draft article 5 shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

3. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence referred to in draft article 5.

4. A State that makes extradition conditional on the existence of a treaty shall:

(a) use the present draft articles as the legal basis for cooperation on extradition with other States, unless it informs the Secretary-General of the United Nations to the contrary at the time of deposit of its instrument of ratification, acceptance or approval of, or accession to the present draft articles; and

(b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States to the present draft articles in order to implement this draft article.

5. States that do not make extradition conditional on the existence of a treaty shall recognize offences to which this draft article applies as extraditable offences between themselves.

6. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State may refuse extradition.

7. States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence referred to in draft article 5.

8. If necessary, the offences set forth in draft article 5 shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 6, paragraph 1.

9. Whenever a State is permitted under its national law to extradite or otherwise surrender one of its nationals only upon condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceedings for

which the extradition or surrender of the person was sought, and that State and the State seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in draft article 9.

10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

11. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any of these reasons.

12. Before refusing extradition, the requested State shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

13. States shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Draft article 12. Non-refoulement

1. No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Draft article 13. *Mutual legal assistance*

General cooperation

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences referred to in draft article 5 in accordance with this draft article.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with draft article 5, paragraph 7, in the requesting State.

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

(a) taking evidence or statements from persons;

(b) effecting service of judicial documents;

(c) executing searches and seizures;

(d) examining objects and sites;

(e) providing information, evidentiary items and expert evaluations;

(f) providing originals or certified copies of relevant documents and records;

(g) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) facilitating the voluntary appearance of persons in the requesting State; or

(k) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this draft article.

Transmission of information without a prior request

6. Without prejudice to national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The transmission of information pursuant to paragraph 6 of this draft article shall be without prejudice to investigations, prosecutions and judicial proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State shall notify the transmitting State prior to the disclosure and, if so requested, consult with the transmitting State. If, in an exceptional case, advance notice is not possible, the receiving State shall inform the transmitting State of the disclosure without delay.

Relationship to treaties on mutual legal assistance between the States concerned

8. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

9. Paragraphs 10 to 28 of this draft article shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal

assistance. If those States are bound by such a treaty, the provisions of that treaty shall apply instead, unless the States agree to apply paragraphs 10 to 28 of this draft article in lieu thereof. States are strongly encouraged to apply those paragraphs if they facilitate cooperation.

Designation of a central authority

10. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State deposits its instrument of ratification, acceptance or approval of or accession to the present draft articles. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

11. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State at the time it deposits its instrument of ratification, acceptance or approval of or accession to the present draft articles. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

12. A request for mutual legal assistance shall contain:

(a) the identity of the authority making the request;

(b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;

(e) where possible, the identity, location and nationality of any person concerned; and

(f) the purpose for which the evidence, information or action is sought.

13. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

14. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to the national law of the requested State and where possible, in accordance with the procedures specified in the request.

15. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

16. Mutual legal assistance may be refused:

(a) if the request is not made in conformity with the provisions of this draft article;

(b) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(c) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

17. Reasons shall be given for any refusal of mutual legal assistance.

18. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

19. Before refusing a request pursuant to paragraph 16 of this draft article or postponing its execution pursuant to paragraph 18 of this draft article, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

20. The requested State:

(a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(b) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

21. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

22. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

Testimony of person from the requested State

23. Without prejudice to the application of paragraph 27 of this draft article, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

24. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by videoconference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in requested State

25. A person who is being detained or is serving a sentence in the territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences referred to in draft article 5, may be transferred if the following conditions are met:

(a) the person freely gives his or her informed consent; and

(b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

26. For the purposes of paragraph 25 of this draft article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(d) The person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

27. Unless the State from which a person is to be transferred in accordance with paragraphs 25 and 26 of this draft article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

28. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

Draft article 14. *Victims, witnesses and others*

1. Each State shall take the necessary measures to ensure that:

(a) any individual who alleges that a person has been subjected to a crime against humanity has the right to complain to the competent authorities; and

(b) complainants, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. These measures shall be without prejudice to the rights of the alleged offender referred to in draft article 10.

2. Each State shall, subject to its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate

stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 10.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation, on an individual or collective basis, consisting of one or more of the following forms: restitution; compensation; rehabilitation; satisfaction; guarantees of non-repetition.

Draft article 15. *Relationship to competent international criminal tribunals*

In the event of a conflict between the rights or obligations of a State under the present draft articles and its rights or obligations under the constitutive instrument of a competent international criminal tribunal, the latter shall prevail.

Draft article 16. *Federal State obligations*

The provisions of the present draft articles shall apply to all parts of federal States without any limitations or exceptions.

Draft article 17. *Inter-State dispute settlement*

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiation.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States, be submitted to arbitration. If, six months after the date of the request for arbitration, those States are unable to agree on the organization of the arbitration, any one of those States may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State may, at the time of signature, ratification, acceptance or approval of or accession to the present draft articles, declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

Draft preamble

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that such crimes against humanity threaten the peace, security and well-being of the world,

Affirming that crimes against humanity, one of the most serious crimes of concern to the international community as a whole, must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, *Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in the present draft articles shall be taken as authorizing any State to intervene in an armed conflict or in the internal affairs of any other State.